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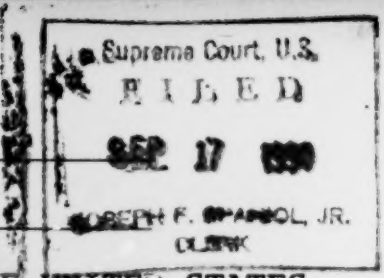

NO. 90-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

JOSEPH BARTLETT, JR.,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division

VICKI GOTKIN ADLER
(Counsel of Record)
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)542-4686
(State Bar No. 006874)

Attorneys for PETITIONER

Questions Presented

1. Did the Arizona Supreme Court misapply the federal constitutional doctrine set forth in Solem v. Helm, 463 U.S. 277 (1983), by finding that the 40-year sentence Bartlett received for engaging in "nonviolent, nonincestuous, heterosexual, and consensual sexual intercourse with two willing post-pubescent teenagers," constituted cruel and unusual punishment under the eighth amendment to the United States Constitution?

2. Should this Court revisit Solem v. Helm, because it has opened the floodgates to appellate review of sentences solely of imprisonment and has resulted in conflicting applications of its doctrine?

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OPINIONS BELOW

The Arizona Court of Appeals, Division II, issued a memorandum decision in this case on November 10, 1988, affirming Bartlett's sentences of imprisonment. State v. Bartlett, 2 CA-CR 88-0024, memo. dec. (Nov. 10, 1988), appended herein as Appendix A.

The Arizona Supreme Court granted review and issued its opinion on April 17, 1990. The court held that Bartlett's mandatory sentence under A.R.S. § 13-604.01 was so disproportionately severe that it violated this Court's proscription against cruel and unusual punishment as interpreted in Solem v. Helm, 463 U.S. 277 (1983). The opinion is reported at ___ Ariz. ____, 792 P.2d 692 (1990), and is appended to this petition as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court, which the state asks this Court to review, was entered on April 17, 1990. The Arizona

Supreme Court denied petitioner's timely motion for reconsideration on June 19, 1990. This petition is filed within 90 days from that denial, on or before September 17, 1990. The state invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent part of the Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

A.R.S. § 13-1405 provides:

> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with a person who is under 18 years of age.
>
> B. Sexual conduct with a minor under 15 years of age is a class 2 felony and is punishable pursuant to § 13-604.01. Sexual conduct with a minor 15 years of age or over is a class 6 felony.

(Emphasis added.)

A.R.S. § 13-604.01, a copy of which is appended to this petition as Appendix C, sets forth the disposition for dangerous crimes committed against children.

STATEMENT OF THE CASE

Heather T.[1] met Bartlett at a restaurant, which local high-schoolers frequented during their lunch breaks. On the day following their initial meeting, Bartlett came to Heather's house, where Heather told him that she was 14 years old. Soon thereafter, Heather ran away from home, and began "dating" Bartlett.

During the 3-month period during which they dated, Heather missed approximately 35 days of school. She soon moved into Bartlett's trailer, where they engaged in sexual intercourse. Heather stopped dating Bartlett because she learned that

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1. For the sake of preserving the anonymity of the victims, only their first names and last initials will be used herein.

he had also been having sexual intercourse with her friends. Heather confronted Bartlett with these rumors, and Bartlett freely admitted that he had been "messing around" with Rebecca G. and Lisa D. Bartlett was also married, had three children, and was living with his estranged wife during all of these events.

Lisa D. also met Bartlett at the same restaurant across from the high school. Shortly after meeting him, she told him her age. In early December, 1986, Lisa and Bartlett had sexual intercourse in his trailer.

A third victim, Rebecca G., also met Bartlett in the parking lot of the restaurant across from the school. Rebecca accompanied Bartlett to his trailer on one occasion, where she, Bartlett, his roommate, and another girl, Sherrill G., played strip poker and drank beer. Sometime during the evening, Rebecca went back to Bartlett's bedroom,

where they had sexual intercourse. Rebecca was only 15 at the time, but never told Bartlett her age.[2]

On January 10, 1986, police responded to the home of Lisa D.'s mother, who accidentally discharged a weapon after learning that her 14-year-old daughter, Lisa (the victim in Count II of the indictment), had had sex with Bartlett. After confiscating the weapon, police directed Mrs. D. to the Sierra Vista Police Department, where she filed a complaint against Bartlett on January 12, 1986.

After learning that police were looking for him, Bartlett, age 23, appeared at the police station some time later that day. A police officer told Bartlett that

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2. Although this is not a legal defense to sexual conduct with a minor under the age of 15 years, it is a defense when the victim is 15 or older, and the defendant did not know or could not reasonably have known the victim's age. A.R.S. § 13-1407(B).

Mrs. D. had accused him of sexually assaulting her daughter, Lisa. Bartlett admitted that he and the 14-year-old had had sex together. He also admitted having sexual relations with another 14-year-old, Heather T. (the subject of Count III of the indictment). He further admitted that he knew that the sexual activity was wrong and that it was against the law, and that he had learned this during law enforcement training he had taken previously.

On January 23, 1987, the Cochise County Grand Jury indicted Bartlett on 3 counts of sexual conduct with a minor, involving Rebecca G., a 15-year-old, Lisa D.[3], and Heather T.,[4] each of whom was 14 years old. The state thereafter moved

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3. In the Arizona Supreme Court's opinion, it refers to this victim as "Mary."

4. The Arizona Supreme Court refers to this victim as "Susan."

to invoke the enhanced punishment provisions of A.R.S. § 13-604(H).

Bartlett absconded prior to trial. The court found Bartlett's absence voluntary and tried him in absentia. The jurors returned verdicts of guilty to sexual conduct with a minor with respect to both Heather and Lisa; however, they acquitted Bartlett on the count involving Rebecca.

Five months after the jurors convicted Bartlett, he was arrested and the trial court entered judgment of guilt to two counts of sexual conduct with a minor under the age of 15, each a class 2 felony and dangerous crime against children, pursuant to A.R.S. §§ 13-1405 and 13-604.01.

During presentence interviews, Bartlett reported that he had been sexually active since the age of 5. He claimed that he first had sexual intercourse at the age of 9 with a girl of the same age. Bartlett noted several other sexual

experiences with what he characterized as "loose girls" at the age of 10 and 11. Bartlett claimed that the girls "came onto" him and he would merely respond.

According to a psychologist who examined Bartlett in August 1987, Bartlett made threatening remarks, stating, "I'm going to make sure those girls are dead if I go to prison."

The probation officer concluded that Bartlett never took full responsibility for his actions, relying, instead, upon his characterizations of all the girls with whom he had been intimate as "loose." Bartlett's participation in all of these encounters, by his account, was merely passive.

The presentence officer believed that Bartlett would be a threat to young girls in the future. His apparent inability to maintain lasting relationships with women his own age and his feelings of inferiority perpetuated his desire for young teens.

Despite a recommendation for the presumptive term of 50 years, the trial court imposed the mitigated minimum term of 40 years. Bartlett will not be eligible for release until the sentence is served.

Bartlett's original appeal to the Arizona Court of Appeals challenged the constitutionality of the sentence, but acknowledged that A.R.S. § 13-604.01 was constitutional on its face. He claimed that, as applied to him, the sentence imposed constituted cruel and unusual punishment in violation of the United States Constitution. The court of appeals affirmed the sentence.

On petition for review, the Arizona Supreme Court applied an extended analysis under Solem v. Helm, 463 U.S. 277 (1983), and concluded that Bartlett's sentences were unconstitutionally cruel and unusual. Acknowledging that Bartlett received the minimum sentence allowed by

law, and noting that there was no more lenient sentence to which Bartlett could be sentenced under the provisions of § 13-604.01, it nevertheless severed the concededly constitutional provisions requiring mandatory sentencing from the substantive provisions of A.R.S. § 13-1405, and remanded the case for resentencing, classifying Bartlett as a class 2 felon without the enhanced penalties required by the legislature for dangerous crimes committed against children.[5]

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5. Under the dangerous crimes against children legislation, the trial court had discretion to sentence Bartlett to a term between 40 and 60 years, but had to impose prison within this range, and parole was not permitted.

REASONS FOR GRANTING THE WRIT

IN MAKING A BREAK FROM TRADITIONAL EIGHTH AMENDMENT ANALYSIS BY EXAMINING SENTENCES OF IMPRISONMENT, AS WELL AS THE MANNER IN WHICH SENTENCES ARE CARRIED OUT, SOLEM v. HELM SET FORTH AN UNWORKABLE TEST TO DETERMINE WHETHER A GIVEN SENTENCE IS PROPORTIONAL TO A GIVEN CRIME; THIS HOLDING CREATED A JUDICIAL ABERRATION, WHICH THE DISSENT FORESAW WOULD RESULT IN CONSTITUTIONAL CHAOS, A RESULT THAT HAS COME TO PASS.

A. HISTORY DEMONSTRATES THE JUDICIAL EVOLUTION THAT OCCURRED BETWEEN RUMMEL v. ESTELLE AND SOLEM v. HELM.

In Rummel v. Estelle, 445 U.S. 263 (1980), this Court specifically rejected the invitation to extend eighth amendment analysis to challenges solely of sentences of imprisonment, finding:

> Given the unique nature of the punishments considered in Weems [v. United States] and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

Rummel, 445 U.S. at 274. This Court found it difficult, if not impossible, to

differentiate between one term of years for a specific crime and another term of years, and refused to engage in that "line-drawing" that is peculiarly the province of the legislatures. Id. at 275. Rummel specifically asked the Court to apply "objective" criteria to determine that his sentence was out of sync with the majority of states whose sentencing provisions were markedly different from the recidivist statute under which he was sentenced to life imprisonment. The majority of this Court rejected these objective criteria, saying:

> Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.

Id. at 283.

Three years later, this Court issued its opinion in Solem v. Helm, 463 U.S. 277 (1983), in which it appeared to embrace the objective criteria it had recently rejected

in Rummel, without overruling that decision. In Solem, this Court set forth an "objective" test to determine whether a given sentence was proportional to a given crime. Factors that a court should consider include:

> (1) Looking at the gravity of the offense and the harshness of the penalty;
> (2) Comparing the sentences imposed on other criminals in the same jurisdiction; and
> (3) Comparing the sentences imposed for the same crimes in other jurisdictions.

Id. at 290-91. The Court completely unraveled its prior precedent and opened the doors to proportionality challenges such as the one before this Court.

B. CHIEF JUSTICE BURGER'S PROPHECY HAS BECOME REALITY.

The concerns outlined by the Rummel majority are the same as those concerns expressed by Chief Justice Burger, writing for the four-member dissent in Solem v. Helm. Chief Justice Burger wrote:

> The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of stare decisis, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases.

Solem v. Helm, 463 U.S. at 304. Chief Justice Burger warned that the majority's decision in Solem would allow appellate judges to substitute their own sense of what is proportional and what is not proportional, undermine the authority given to legislatures to define crimes and determine punishments, and subject all sentences of imprisonment to appellate scrutiny. Id. at 305.

Chief Justice Burger, pointing out the futility of comparing disparate crimes and punishments, reiterated:

> It is one thing for a Court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a Court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix.

Rummel, 445 U.S. at 281. The Chief Justice warned that making comparisons among the various states tramples on the fundamental concepts of federalism, and ignores the implication of various legislatures' recognition of different societal interests. Such comparisons are thus rendered speculative at best.

Chief Justice Burger attempted to set forth some hypothetical examples of what the future would bring:

> Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes.

Solem v. Helm, 463 U.S. at 314-15.

Just as Chief Justice Burger warned, the majority's opinion in Solem v. Helm provided no guidelines for implementation of the tests set forth therein. There is

no meaningful way to measure the weight to be given to certain offenses, or the legislative intent behind the enactment of certain penalties. The Chief Justice feared that the majority's decision would flood appellate courts with cases challenging sentences on eighth amendment grounds and "administer the coup de grace to the courts of appeals as we know them." Solem v. Helm, 463 U.S. at 316. As the statistics reported below demonstrate, the Chief Justice's fears have indeed become a reality, as the appellate courts have been flooded with challenges to the proportionality of sentences, following the Solem v. Helm decision.[6]

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6. As of September 5, 1990, there were 772 reported decisions citing Solem v. Helm. Of those cases reviewed, it is apparent that various state and federal courts interpret the mandate of Solem differently. Some interpret the case to require review only of sentences of life imprisonment without the possibility of parole [Maddox v. State, 502 So. 2d 790 (Ala. 1986); McLester v. State, 460 So. 2d 870, 873-75 n.2 (Ala. Crim. App. 1984);

However, actual comparisons among states are impossible, given the varieties of sentences available for a variety of different criminals. The instant case is a prime example. The charts set forth in Appendix E demonstrate that numerous factors play upon what any given defendant may receive as a sentence for a similar crime. These variables and permutations complicate and obscure any meaningful analysis, and demonstrate the lack of objectivity inherent in the tests outlined by the Solem Court.

(Footnote 6 continued)
Webb v. State, 539 So. 2d 343 (Ala. Crim. App. 1987); Donahoo v. State, 505 So. 2d 1067 (Ala. Crim. App. 1986). See United States v. Rhodes, 779 F.2d 1019, 1027-28 (4th Cir. 1985), cert. denied, 476 U.S. 1182 (1986)]; while others seem to put each sentence before it through the rigors of a Solem analysis. A comparison of the different interpretations of the eighth amendment spawned by Solem is discussed infra at 20.

C. COURTS HAVE PLACED DIFFERENT INTERPRETATIONS UPON THE DOCTRINE SET FORTH IN SOLEM v. HELM, THEREBY MAKING COMPARISONS REQUIRED THEREUNDER IMPOSSIBLE.

As mentioned earlier, there is a vast uncertainty among state and federal courts about the meaning of the tests set forth in Solem v. Helm, and the cases to which they apply. In Marrero v. Wainwright, 823 F.2d 1468, 1470 (11th Cir. 1987), the Eleventh Circuit Court of Appeals rejected the argument propounded by the government that only those cases involving ineligibility for parole were subject to review under Solem.

In contrast to the Marrero decision, the Alabama courts and the Fourth Circuit Court of Appeals have held that the Solem v. Helm analysis is to be applied only in cases involving sentences of life without the possibility of parole. See footnote 6, supra.

In Maryland, when applying the second prong of the Solem v. Helm test, the

court compares defendants who have committed crimes within the same category of offenses. See State v. Davis, 310 Md. 611, 530 A.2d 1223 (Md. 1987). The Maryland court looks at particular categories of crimes, and the punishments set forth therefor. If all defendants who commit a particular class of crime are sentenced similarly, the inquiry ends under this prong of the Solem test. The Ninth Circuit Court of Appeals has interpreted Solem and upheld sentences challenged under the second prong, because all offenders who committed crimes while released from confinement were treated alike. Cocio v. Bramlett, 872 F.2d 889 (9th Cir. 1989). By contrast, the Arizona Supreme Court held that a court must look at punishments for any and all crimes that can be committed within a jurisdiction to meet the Solem test. Bartlett, 792 P.2d at 699.

Under the third prong of Solem, both Maryland and the fourth circuit subscribe to the interpretation that Solem requires a comparison of what sentences could be imposed in other jurisdictions, not merely what sentences actually have been imposed. State v. Davis; United States v. Rhodes; Teeter v. State, 499 A.2d 503 (Md. App. 1985). By contrast, the Arizona court stated it must look at other sentences actually imposed, to meet the Solem test. Bartlett, 792 P.2d at 700-03.

D. THE ARIZONA SUPREME COURT MISAPPLIED THE DOCTRINE SET FORTH IN SOLEM v. HELM, FELL INTO CONFLICT WITH OTHER JURISDICTIONS IN DOING THE EIGHTH AMENDMENT ANALYSIS, AND FULFILLED EACH OF CHIEF JUSTICE BURGER'S PREDICTIONS.

The Arizona Supreme Court erred as a matter of federal constitutional law by failing to properly apply the proportionality tests set forth in Solem v. Helm to Bartlett's sentences. The Arizona Supreme Court's decision is

directly in conflict with opinions of other states' highest courts. In fashioning a remedy for the wrong perceived to have been committed against Bartlett in sentencing him, the Arizona Supreme Court formulated an unlawful resolution. The court impermissibly disregarded the mandates of the Arizona legislature in defining the crimes Bartlett committed, and redefined his crimes, so that Bartlett could be sentenced to a range within parameters the Arizona Supreme Court promulgated.

Both Lisa and Heather were under the age of 15 years; therefore, Bartlett's crimes constituted class 2 felonies, and the court was bound to apply the sentencing provisions of the dangerous crimes against children act. See A.R.S. §§ 13-1405; 13-604.01.

The Arizona Supreme Court concluded that the sentences imposed upon Bartlett were grossly disproportionate to his

crimes "involving participation in nonviolent, nonincestuous, heterosexual, and consensual sexual intercourse with two willing post-pubescent teenagers." State v. Bartlett, 792 P.2d at 696. It nevertheless found the sentencing statute facially valid.

Although the Arizona Supreme Court noted that it had a duty to give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," it nevertheless determined that Bartlett's sentences were constitutionally invalid. The Arizona Supreme Court determined that the court was the body charged with judging the moral sense of the community, and concluded it must analyze each challenge to the constitutionality of a sentence on a case-by-case basis:

> according to the circumstances of the particular crime, the defendant's personal culpability,

> and by the perceptions of contemporary society at the time the decision is rendered . . . .

Bartlett, 792 P.2d at 696.

The Arizona Supreme Court limited its inquiry under all prongs of the Solem test, in order to satisfy its conclusion that the sentences imposed were unconstitutionally cruel and unusual.

In reassessing the gravity of the offense and harshness of the penalty, the Arizona Supreme Court directly supplanted its values for those of the people of Arizona. The Arizona Legislature enacted the dangerous crimes against children legislation in response to great public outcry resulting from heinous and repeated crimes of sexual offenses and murders of children taking place in Arizona in the early 1980s. Minutes of the Arizona legislature, demonstrating the public's concern and support of this legislation, is attached hereto as Appendix D. The Arizona Supreme Court

determined, however, that, because the victims in this case were nearly 15 years of age, sexually sophisticated, and willing participants in the sexual activity, Bartlett's crimes were less serious offenses, despite the legislature's mandates to the contrary. The court reasoned that Bartlett should be treated more like defendants who engaged in sexual conduct with minors between the ages of 15 and 18.

The legislature clearly determined that consent and proximity to one's 15th birthday were irrelevant to culpability under the statute prohibiting sexual conduct with minors, but the court stated:

> Additionally, we must consider the minors' proximities to their 15th birthdays.
>
> Although the legislature may be forced to draw a "bright line" at a particular age (in this case at the age of 15) in distinguishing between class 6 and class 2 sexual conduct felonies, a reviewing court can look at a more graduated line, depending upon the nature of the individual offense, in

> deciding the proportionality of the punishment to the crime. Thus, although the fact that both consenting girls were close to their 15th birthdays cannot be used to reduce the crimes from class 2 felonies to class 6 felonies, the punishment imposed for those harsher class 2 felonies must be proportionate to these individual offenses.

Bartlett, 792 P.2d at 698 (emphasis added).

The Arizona Supreme Court thus missapplied the first prong of the Solem test by looking more at subjective factors, coupled with the individual views of the justices reviewing the case, to minimize the gravity of the offense and to justify its result.

In applying the second prong of the Solem v. Helm test, the Arizona Supreme Court "examine[d] the sentences imposed in Arizona on defendants who commit crimes more serious than this defendant's." Bartlett, 792 P.2d at 699. See Solem, 463 U.S. at 292. The Arizona Supreme Court rejected the argument that it should

compare sentences for crimes of similar gravity, i.e., crimes committed against children. It insisted that, because similar crimes against adults result in lighter sentences, Bartlett's sentences are unconstitutionally disproportionate. Bartlett, 792 P.2d at 699.

Under the third prong of the Solem test, the Arizona Supreme Court "examine[d] the punishment imposed for the same crime in other jurisdictions." Solem v. Helm, 463 U.S. at 292. Without regard to the sentences imposable in other jurisdictions for crimes arguably identical to the crimes committed by Bartlett, the Arizona Supreme Court limited its comparison only to those sentences actually imposed and memorialized in published opinions of other courts, where the combination of mandatory sentencing, repeat offender classification, parole ineligibility, and identity of elements coalesced.

Petitioner submits that, in applying the third prong of the Solem v. Helm test, appellate courts must look not only to what sentences actually have been imposed by courts exercising discretion under the facts of particular cases, but also to those sentences imposable under the statutory schemes of the various state legislatures. Petitioner provided the Arizona Supreme Court with charts indicating the crimes most closely comparable to the crimes Bartlett committed, and noted that, in 26 other jurisdictions, Bartlett could have received at least as severe a punishment as the sentence he received in Arizona.[7]

Acknowledging that this Court has said that successful challenges to the proportionality of particular sentences

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7. See Appendix E attached hereto, reflecting the sentencing provisions from the other 49 states, the District of Columbia and the Virgin Islands.

are "exceedingly rare," the Arizona Supreme Court found this to be such a rare case. State v. Bartlett, 792 P.2d at 703. Faced with the task of formulating a remedy, the court recognized that it could not reduce the sentence without obliterating the mandatory sentencing provisions from A.R.S. § 13-1405, and redefining Bartlett's crimes. It thus did so by severing concededly constitutional sentencing provisions and declaring them inapplicable to Bartlett, all under the authority of the eighth amendment. The result is that Bartlett may now be sentenced to less than the statutory minimum.

The Arizona Supreme Court's analysis under Solem v. Helm, although purportedly limited to the facts before it, opens the floodgates to similar challenges under the mandatory provisions of A.R.S. § 13-604.01, and has the effect of

undermining the legislative determinations in each of those potential challenges.

Although death penalty cases have always stood in a class of their own, they are instructive on the issue of whether proportionality analysis, as it now exists under Solem v. Helm, is required at all. In McClesky v. Kemp, 481 U.S. 279 (1987), this Court found that inconsistency in sentences is tolerable in a federalistic society, and:

> [W]here the statutory procedures adequately channeled the sentencer's discretion, such proportionality review is not constitutionally required.

Id. at ___ n. 28, 107 S. Ct. 1775 n. 28, 95 L. Ed. 2d 262 (emphasis added). See also Pulley v. Harris, 465 U.S. 37, 50-51 (1984). McClesky held that, absent a showing that a capital punishment system operates in an arbitrary and capricious manner, a defendant cannot prove a constitutional violation by demonstrating

that other defendants who may be similarly situated did not receive the same penalty. McClesky, 481 U.S. 279 at ___, 107 S. Ct. 1756 at 1774, 95 L. Ed. 2d at 262.

For the same reasons cited in McClesky as rendering proportionality analysis difficult, if not impossible, the permutations of varying states' sentencing provisions in non-death penalty cases is mind boggling. Given the nuances of sentencing factors and the variables of each individual case, a meaningful comparison can never be done under the Arizona Supreme Court's formulation of the Solem v. Helm rule.

It seems odd that, in death penalty cases, proportionality review is not required; however, in cases not involving the death penalty, but subject to great variations in punishments for differently defined crimes, such analysis is required. The Arizona Supreme Court's interpretation

of Solem v. Helm appears to sanction such review whenever it is requested.

Absent egregious punishments, such as those inflicted in Weems v. United States, 271 U.S. 349 (1910), an appellate court should not undertake an extensive proportionality analysis, as the Arizona Supreme Court thought justified in the case before this Court.

Based upon the Arizona Supreme Court's erroneous application of Solem v. Helm, on resentencing, Bartlett could serve as little as one additional year in prison, for crimes the legislature mandated should be punished for no less than 40 years.

Petitioner submits that, in reaching this result, the Arizona Supreme Court erred by misapplying the constitutional doctrine set forth in Solem v. Helm, invaded the legislative domain by substituting its judgment for that of the

People of the State of Arizona, and formulated an unlawful sentencing remedy by classifying Bartlett as a "regular" class 2 felon, instead of a dangerous criminal. The result is that Bartlett will now be sentenced to a term less than the statutory minimum for the crimes he committed.

Petitioner asks this Court to accept review of this matter to reexamine Solem v. Helm, to determine whether the Arizona Supreme Court misapplied that case, and to resolve the great conflict that exists across the country among courts regarding the appropriate cases to which to apply Solem v. Helm. In its present framework, Solem v. Helm is unworkable, and should either be modified or overruled.

CONCLUSION

The Arizona Supreme Court misinterpreted and misapplied the doctrine set forth in Solem v. Helm in finding the mandatory minimum sentence for 2 counts of sexual conduct with minors, defined as dangerous crimes against children, unconstitutionally cruel and unusual in violation of the eighth amendment to the United States Constitution. Additionally, the Arizona Supreme Court flagrantly overreached its authority by reclassifying Bartlett's crimes and permitting him to be sentenced to less than the statutory minimum.

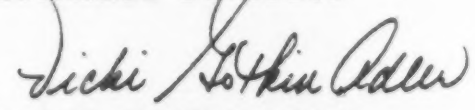
Because Arizona's analysis conflicts with this Court's and other courts' eighth amendment analyses, petitioner urges this Court to accept review, and to overrule the Arizona Supreme Court's determination that the sentences imposed upon Bartlett are unconstitutional. Since these sentences could be imposed upon others similarly situated in 26 other jurisdictions, and

upon other dangerous criminals who commit crimes in the State of Arizona against Arizona's children, Bartlett's sentences pass constitutional muster and should be upheld. Petitioner therefore urges this Court to step back from its holding in Solem v. Helm and save its eighth amendment review for cases truly warranting it. In the alternative, petitioner asks this Court to modify that decision to afford litigants guidance in applying the criteria set forth therein.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division



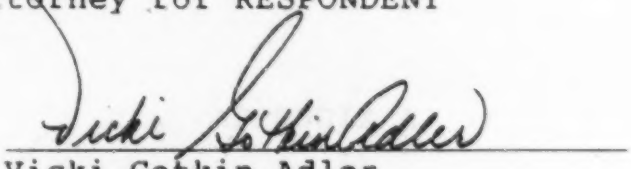
VICKI GOTKIN ADLER
(Counsel of Record)
Assistant Attorney General

Attorneys for PETITIONER

CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 13th day of September, 1990, to:

DAVID FLANNIGAN
P.O. Box 4340
Bisbee, Arizona 85603
Attorney for RESPONDENT



Vicki Gotkin Adler
Assistant Attorney General
Criminal Division
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007

CRM88-0227/4616D/ch

APPENDIX A

[Filed November 10, 1988]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSEPH BARTLETT, JR., Appellant.	2 CA-CR 88-0024 Department A MEMORANDUM DECISION Not for Publication Rule 28(a)(2), Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF
COCHISE COUNTY

Cause No. CR 87-00020

Honorable Richard A. Winkler, Judge

AFFIRMED

Robert K. Corbin, The Attorney General
by William J. Schafer III and
Vicki Gotkin Adler Phoenix
Attorneys for Appellee

David P. Flannigan Bisbee

Attorney for Appellant

L I V E R M O R E, Presiding Judge.

In this appeal from a conviction of two counts of sexual conduct with a minor under age 15, the defendant contends that his confession was involuntary and that his forty-year sentence is unconstitutionally excessive. We disagree and affirm.

The facts surrounding the confession are that the defendant came to the police station with a friend because he had learned that police had made inquiries concerning him. In a short conversation with an officer, defendant admitted the acts leading to his convictions. He then left the station. Because defendant was not in custody, no Miranda warnings were required. State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988). Because no coercive police tactics were used, the admissions were voluntary. State v. Tucker, ___ Ariz. ___, 759 P.2d 579 (1988).

Defendant's argument that the long sentence imposed for sexual conduct with a

minor violates the constitutional proscription against cruel and unusual punishment has been twice rejected by this court. State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987); State v. Crego, 154 Ariz. 278, 742 P.2d 289 (App. 1987). We do so again. The remainder of his argument is a heartfelt objection to the consequences of mandatory sentencing on the facts of this case. That is better addressed to the legislature. We do not believe courts have either inherent power or power under A.R.S. § 13-4037 to impose a sentence below the statutory minimum.

Affirmed.

JOSEPH M. LIVERMORE, Presiding Judge

CONCURRING:

JAMES D. HATHAWAY, Judge

LAWRENCE HOWARD, Judge

APPENDIX B

[Filed April 17, 1990]

IN THE SUPREME COURT OF THE STATE
OF ARIZONA
EN BANC

STATE OF ARIZONA,	)	Supreme Court
	)	CR-88-0411-PR
Appellee,	)	
	)	Court of Appeals
v.	)	2 CA-CR 88-0024
	)	
JOSEPH BARTLETT, JR.,	)	Cochise County
	)	CR-87-00020
Appellant.	)	
	)	O P I N I O N
	)	

Appeal from the Superior Court
of Cochise County

The Honorable Richard A. Winkler, Judge

REMANDED FOR SENTENCING

Memorandum Decision of the Court
of Appeals, Division Two

(filed Nov. 10, 1988)

VACATED IN PART

Robert K. Corbin, Attorney General
by Bruce M. Ferg, Assistant
Attorney General Tucson
Vicki Gotkin Adler, Assistant
Attorney General Phoenix
Attorneys for Appellee

David P. Flannigan
Attorney for Appellant Bisbee

Robert F. Arentz, Cochise County Public Defender
by James L. Conlogue, Deputy Public Defender
Amicus Curiae for Cochise County Public Defender Bisbee

Harrison, Harper, Christian & Dichter, P.C.
by Stephen M. Dichter
Amicus Curiae for Arizona Attorneys for Criminal Justice Phoenix

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C O R C O R A N, Justice

Defendant Joseph Bartlett, Jr. (defendant) petitions for review of the court of appeals decision affirming his convictions for two counts of sexual conduct with a minor under 15 years of age, class 2 felonies and dangerous crimes against children, and the resulting mandatory minimum consecutive sentences totalling 40 years without possibility of early release. We granted review to determine whether these sentences constitute cruel and unusual punishment and ordered the parties to

submit supplemental briefing addressing the following questions.

> 1. Under the facts of this case, is the mandatory sentence required by A.R.S. § 13-604.01 so disproportionately severe that it violates those provisions of the state and federal constitutions that prohibit cruel and unusual punishment?
>
> 2. If the mandatory sentence prescribed by the applicable statute is unconstitutional as applied to the facts of the crime, what is the proper disposition?

We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. § 12-120.24. For the reasons that follow, we hold that the sentences imposed are disproportionate to defendant's crimes under the analysis required by Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), and thus were unconstitutionally imposed. We therefore remand the matter for resentencing.

Factual and Procedural Background

In September 1986, defendant, then 23 years old, was introduced through a

mutual friend to a 9th grade student whom we shall call Mary,[1] then 14 1/2 years old. Defendant and Mary saw each other every day in September, October, and November, 1986, dated occasionally, and, according to Mary, considered themselves "boyfriend and girlfriend." In December 1986 Mary ran away from her father's home, where she had been living, and stayed with defendant for 4 days before moving back to her mother's home. Mary testified that she and defendant became physically intimate sometime in December 1986, when she voluntarily had sexual intercourse

---

[1] We will use fictitious names for the two teenage girls involved in this case. This is in accordance with our policy of October 24, 1989, in which the Chief Justice advised all appellate judges "to avoid, where possible, referring by name in appellate opinions to individual victims or witnesses who are minors or victims of crimes, where naming them would cause them danger or unnecessary embarrassment. Referring by name should occur only where it is absolutely necessary for clarity.

with him. At that time, Mary was two months short of her 15th birthday.

During the fall of 1986, Mary introduced defendant to her 14 1/2-year-old friend, whom we shall call Susan. Defendant lived in the same trailer park as Susan, and Susan often ate lunch with Mary and defendant at the parking lot across the street from the high school that Mary and Susan attended. Susan testified that defendant did not act like he was 23, but was "immature" in that he behaved like and associated with young teenagers. In early December 1986, Susan went to defendant's home and voluntarily had sexual intercourse with him; at the time, Susan was 6 months short of her 15th birthday.

Mary terminated her relationship with defendant around March 1987, when he admitted to "messing around" with some of her friends. Susan did not continue her

sexual relationship with defendant after the initial incident.

In January 1987, police responded to a report of an accidental discharge of a weapon at defendant's trailer park when Susan's mother went looking for defendant after learning of her daughter's sexual encounter with him. The officers confiscated the weapon. The mother filed a complaint, alleging that defendant had forcibly sexually assaulted her 14-year-old daughter. When defendant heard from neighbors that police had inquired about him at the trailer park, he voluntarily went to the police station to find out why they were looking for him. Officer Robert Pearce invited defendant into his back office to talk, and informed defendant that the girl's mother had reported his forcible sexual assault of the 14-year-old. Defendant denied the mother's accusation and told Officer Pearce that he and Susan had consensual intercourse on one occasion, which he alleged was initiated by Susan

when she came to his home. The officer also asked about defendant's relationship with Mary; defendant admitted that he had consensual sexual intercourse with Mary while they were dating. Officer Pearce taped most of defendant's statements but did not arrest defendant after the interview.

Susan later recanted the account of forcible sexual assault that she had told her mother and admitted that she and defendant had consensual sexual intercourse. Based on the evidence that defendant had sexual intercourse with two 14-year-old girls, he was charged with two counts of sexual conduct with a minor under the age of 15 years, class 2 felonies, and dangerous crimes against children.[2] The

---

[2] Defendant was also charged with a third count of sexual conduct with a minor aged 15 years, a class 6 felony, involving a third teenager. However, the jury acquitted him of that charge at trial, and the circumstances involving that incident are not relevant to this review.

state also filed a motion to invoke enhanced punishment by treating a conviction on one count as a prior conviction for purposes of enhancing the other, pursuant to A.R.S. § 13-604(H). See A.R.S. § 13-604.01(A), (H).

Defendant pleaded not guilty[3] but did not appear at trial. Both Mary and Susan testified that their sexual conduct with defendant was consensual and that defendant knew each of them was 14 years old. Officer Pearce testified that, during the interview at the police station, defendant had admitted to consensual sexual intercourse with both girls and acknowledged he was aware of their ages. The jury found defendant

---

3 The record indicates that defendant, against his counsel's advice, rejected the state's offer of a stipulated 5-year sentence for all 3 counts if defendant would enter an agreement to plead guilty. Had the offer been accepted, the state apparently would have amended and reduced the charges to make a 5-year sentence statutorily available.

guilty of two counts of sexual conduct with a minor under 15 years old. The court ordered preparation of a presentence report.

The presentence report indicated that, while on release awaiting trial, defendant voluntarily sought outpatient counseling. His counselor indicated that defendant visited her only once; she "suspected that he feels 'intimidated' by women in his own age group and that this is why he is attracted to younger girls." She also indicated her impression that defendant was "immature for his age."

The report also noted that defendant was married but separated pending a divorce, that his wife was living in Nevada with their 3 small children, and that he had no prior felony convictions. The presentence evaluation included the following analysis and recommendation:

> A reasonably intelligent individual, Bartlett's attraction

> to young girls may very well be a sign of inferiority around women his own age. Further, the description of his early sexual experiences may indicate a long term deep [seated] problem with women and sex. His justification for his sexual conduct seems to rest with the "loose" character of the female involved, regardless of their age. He tends to relinquish any responsibility on his part by appearing to be a passive participant in all of his sexual encounters.
>
> . . . .
>
> Overall, he appears to be an irresponsible and immature 24 year old man who may continue to present a threat to young girls. His lack of any prior felonies coupled with the seriousness of the offenses, may indicate that the presumptive term in [the Department of Corrections] is appropriate.

At sentencing, the court imposed the minimum mandatory sentence on each count: 15 years for the first count as a nonrepetitive dangerous crime against children, and 25 years on the second count as a repetitive dangerous crime against children, to be served consecutively without any possibility of early release. See generally A.R.S.

§ 13-604.01. The court expressed its regret at having to impose such a harsh sentence in the following remarks at sentencing:

> THE COURT: Well, I have very little choice in this regard, to put it mildly. The law in Arizona in connection with an offense of this nature is very stringent. As I have reviewed the law and is indicated in the pre-sentence report, the law provides for a very severe presumptive term on each of the counts. The law also provides that each day of the sentence must be served. The law also provides that the sentences must be consecutive, and the law also provides that the subsequent offense is subject to a more severe presumptive term.
>
> My function, as I view it, is not to second guess the legislature in regard to sentencing, but to follow the law. I took an oath to do that. The law is very severe. . . . The punishment is more severe than in many other types of cases that are very serious offenses. But it is not my function to second guess what the wisdom of the sentence is.
>
> If in fact the sentence is too severe, I think that's for the appellate courts to review. So I really have nothing else to say in regard to sentencing. I'm going to impose the mitigated term, because I think that it is plenty severe in the case.

The court credited defendant with 88 days of presentence incarceration and ordered him to pay $100 to the victim's compensation fund. Defendant timely appealed. The court of appeals affirmed defendant's convictions and sentences and defendant sought review in this court.

The Court of Appeals Decision

Defendant argued on appeal that his confession was involuntary and that his sentence was cruel and unusual. The court of appeals first concluded that the confession was voluntary; that holding is not at issue in this review. In the remaining one-paragraph analysis, the court affirmed defendant's sentence:

> Defendant's argument that the long sentence imposed for sexual conduct with a minor violates the constitutional proscription against cruel and unusual punishment has been twice rejected by this court. State v. Smith, 156 Ariz. 518, 753 P.2d 1174 (App. 1987); State v. Crego, 154 Ariz. 278, 742 P.2d 289 (App. 1987). We do so again. The remainder of his argument is a heartfelt objection to the consequences of mandatory sentencing on the facts of this

> case. That is better addressed to the legislature. We do not believe courts have either inherent power or power under A.R.S. § 13-4037 to impose a sentence below the statutory minimum.

Defendant petitioned this court for review of this decision; we granted review only of the constitutional issue whether defendant's sentences are unconstitutionally cruel and unusual under the particular facts of this case.

Analysis

1. The Statutory Sentencing Scheme

Defendant was charged with violating A.R.S. § 13-1405, which provides:

> Sexual conduct with a minor; classifications
>
> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.
>
> B. Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to A.R.S. § 13-604.01. Sexual conduct with a minor

fifteen years of age or over is a class 6 felony.

The fact that a minor under age 18 consents to sexual intercourse is not a defense under the statute. State v. Fristoe, 135 Ariz. 25, 30, 658 P.2d 825, 830 (App. 1982). The statute differentiates between an offense with a minor between the ages of 15 and 18, and an offense with a minor younger than 15, in classifying the former as a class 6 felony and the latter as a class 2 felony.

Because both girls engaged in consensual conduct with defendant before their 15th birthdays, however, these offenses were designated class 2 felonies, and the court was required to apply the more stringent sentencing provisions of the dangerous crimes against children act. See A.R.S. §§ 13-1405; 13-604.01. Under that sentencing scheme, the mandatory minimum sentence for the first offense is 15 years,

the presumptive term is 20 years, and the maximum term is 25 years. A.R.S. § 13-604.01(A), (D). Defendant would not be eligible for probation or early release until the full sentence is served. A.R.S. § 13-604.01(E). Because the first offense is a "predicate felony" that enhances the sentence for the second offense, see A.R.S. § 13-604.01(K)(2), the sentencing range for the second offense increases to a mandatory minimum term of 25 years, a presumptive term of 30 years, and a maximum term of 35 years. A.R.S. § 13-604.01(A), (D). The statute also requires that the second sentence be consecutive to the first, A.R.S. § 13-604.01(J), with no possibility of early release until every day of both sentences has been served. A.R.S. § 13-604.01(E).

The practical effect of these sentencing provisions is that defendant, having received the minimum sentences

within the trial court's discretion on both counts, must serve 40 years in prison for these two offenses. He would be 64 years old before he could entertain the possibility of release.

2. Cruel and Unusual Punishment: Solem v. Helm Analysis

Defendant challenges as cruel and unusual punishment the sentencing provisions of A.R.S. § 13-604.01 only as applied to the facts of his case. In particular, he challenges the mandatory minimum sentences of 15 years for the first offense and 25 years for the second offense as grossly disproportionate to his crimes involving participation in nonviolent, nonincestuous, heterosexual, and consensual sexual intercourse with two willing post-pubescent teenagers. He does not challenge the facial validity of the statute as applied to other, more heinous crimes against children under different circumstances.

The power to define crimes and to provide for their punishment is one held by the legislature. Rummel v. Estelle, 445 U.S. 263, 284-85, 100 S. Ct. 1133, 1144-45, 63 L. Ed. 2d 382 (1980); State v. Marquez, 127 Ariz. 98, 103, 618 P.2d 592, 597 (1980). As a reviewing court, we must give "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . ." Solem v. Helm, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009, 77 L. Ed. 2d 637 (1983). However, the fact that the legislature enacts a punishment does not conclusively establish its constitutional validity; the eighth amendment prohibition against cruel and unusual punishment is a limit on the legislature's power to mandate penalties. State v. Mulalley, 127 Ariz. 92, 95, 618 P.2d 586, 589 (1980). If we

find a mandatory penalty so severe "as to shock the conscience of society," we must find it cruel and unusual. State v. Davis, 108 Ariz. 335, 337, 498 P.2d 202, 204 (1982). We judge whether the moral sense of the community is shocked by whether the punishment is overly severe or disproportionate to the crime. State v. Taylor, 82 Ariz. 289, 294, 312 P.2d 162, 166 (1957). We analyze such challenges on a case-by-case basis, according to the circumstances of the particular crime, the defendant's personal culpability, and by the perceptions of contemporary society at the time the decision is rendered rather than by our own standards. See generally Mulalley, Taylor.

The United States Supreme Court has enunciated a 3-prong test to determine if a sentence is so disproportionate to the crime as to violate the eighth amendment as cruel and unusual punishment. See

Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). The Solem analysis requires us to examine: (1) the gravity of the offense and the harshness of the penalty; (2) a comparison of other sentences imposed in the same jurisdiction for more serious crimes; and (3) a comparison of sentences in other jurisdictions for the same crime. 463 U.S. at 292. This court previously utilized the same factors, even before Solem v. Helm articulated them, in deciding when a punishment is unconstitutionally cruel and unusual:

> In evaluating the proportionality of a criminal sanction, we will consider not only the nature of the crime and of the offender, . . . but we will compare it with punishments for the same crime in other jurisdictions and for other crimes within our own jurisdiction. Because the "enactments of legislative bodies . . . serve as some index of community standards and values," . . . they help give objective content to the "conscience of society." In comparing the sentence actually imposed with

> sanctions provided in other jurisdictions, we do not, of course, seek to conform our statutes "to the 'majority rule' or the least common denominator of penalties nationwide." . . . Rather we seek evidence of what sanctions are currently considered acceptable in our society for the crime considered.

Mulalley, 127 Ariz. at 96, 618 P.2d at 590. We previously applied the Solem analysis to uphold sentences imposed under A.R.S. § 13-604.01 for other dangerous crimes against children. See State v. Jonas, No. CR-89-0021-PR (Ariz. filed April , 1990); State v. Taylor, 160 Ariz. 415, 422-23, 773 P.2d 974, 981-82 (1989). Our court of appeals has also applied the Solem factors to decide eighth amendment attacks against sentences for crimes against children. See State v. Byrd, 160 Ariz. 282, 284, 772 P.2d 1135, 1137 (App. 1988); State v. Smith, 156 Ariz. 518, 525-26, 753 P.2d 1174, 1181-82 (App. 1987); State v. Crego, 154 Ariz. 278, 280, 742 P.2d 289,

291 (App. 1987). We now determine whether the eighth amendment is violated by applying the mandatory sentencing provisions of A.R.S. § 13-604.01 to this particular defendant under the specific facts of this case.

A. Gravity of the Offense and Harshness of the Penalty

In determining the gravity of the offense, we must examine the type of harm threatened or inflicted and the level of defendant's culpability, measured by the seriousness of the crime, against whom it was committed, and its level of violence. Solem, 463 U.S. at 292-93; Jonas, slip op. at 12.

In enacting the harsh penalties of the dangerous crimes against children act, the legislature determined the crimes against children are among the most serious crimes in our society. By providing lesser penalties for those crimes against children who have reached

the age of 15, the legislature also determined that crimes against children under age 15 are more serious crimes than those against older children. This "line-drawing" functioning is properly the legislature's. See Jonas, slip op. at 16. Additionally, by not providing the defense of consent to sexual conduct with a child younger than 18, the legislature declared that, in its judgment, children below the age of majority are incapable of making a mature decision to engage in sexual conduct. See Fristoe, 135 Ariz. at 30, 658 P.2d at 830 ("When a person has participated in sexual conduct with a minor, he is equally guilty of the crime whether he forced himself upon the minor or whether he succeeds in persuading the minor to allow the sexual act to take place"). But see State v. Puig, 154 Ariz. 624, 628-29, 744 P.2d 725, 729-30 (App. 1987) (although consent is not at issue if

minor is under 15, where minor is older than 15 and defendant reasonably believes the minor to be over 18, consent will be a defense to a sexual abuse charge).

Although the minor's consent will not decriminalize the sexual conduct, that consent is relevant to our inquiry into the gravity of the offense. In this case, both minors were close to the maturity line that the legislature has drawn for less serious offenses. According to their testimonies, both were willing participants in defendant's conduct. Defendant used no violent force or threats against them. Neither girl was physically injured or testified to any emotional trauma. Under these circumstances, we must certainly consider these offenses less grave than the others punishable under the same statutory scheme: second degree murder, sexual assault, taking a child for the purposes

of prostitution, child prostitution, involving or using a minor in drug offenses, aggravated assault, molestation of a child, sexual exploitation of a minor, child abuse, or kidnapping. See generally A.R.S. § 13-604.01.

Additionally, we must consider the minors' proximities to their 15th birthdays. Although the legislature may be forced to draw a "bright line" at a particular age (in this case, at the age of 15) in distinguishing between class 6 and class 2 sexual conduct felonies, a reviewing court can look at a more graduated line, depending on the nature of the individual offense, in deciding the proportionality of the punishment to the crime. Thus, although the fact that both consenting girls were close to their 15th birthdays cannot be used to reduce the crimes from class 2 felonies to class 6 felonies, the punishment imposed for those harsher class 2 felonies must

be proportionate to these individual offenses. And although the legislature has determined that a minor's "consent" to sexual conduct does not excuse its commission, certainly the punishment for consensual sexual conduct with a minor over 14 1/2 years old should be closer to the punishment for sexual conduct with a 15-year-old than to punishment for sexual conduct with a 2-year-old. We thus examine what punishment defendant would have received if the minors were 15.

If Mary and Susan had been two months and six months older, respectively, defendant would have faced sentencing for two counts of a class 6 felony for sexual conduct with a minor 15 years of age. The range of sentencing for the first offense would have been a minimum term of 9 months, a presumptive term of 1.5 years, and a maximum term of 1.875 years. See A.R.S. §§ 13-701(C)(5), -702(A). The trial court would have had

discretion to place defendant on probation and to designate the offense as a class 1 misdemeanor upon successful completion of that probation. See A.R.S. § 13-702(H). If imprisoned, defendant would have been eligible for early release after one-half the sentence had been served. The range of sentencing for the second offense, as a repetitive felony under A.R.S. § 13-604(H), would have been a minimum term of 1.5 years, a presumptive term of 2.25 years, and a maximum term of 3 years. See A.R.S. §§ 13-604(A), -702(H). Defendant would not have been eligible for probation for the second offense, but would have been eligible for early release after one-half the sentence had been served. See A.R.S. § 13-604(A). Defendant's terms could have been imposed either consecutively or concurrently, within the trial court's discretion. See A.R.S. § 13-708. The

sentences defendant actually received were significantly more harsh.

As to defendant's personal culpability, the record indicates that he was an "immature" young man who associated with a younger peer group because of his emotional insecurities, which included a pending divorce after marriage at a young age. He had no prior felony record and no history of assaulting young children. No evidence was presented that he intended to harm these girls, either physically or emotionally. But for his age of 23, this situation would be similar to others in which we have recognized a defendant may have less culpability in a crime resulting from a teenage romance:

> We do not for a moment undertake to minimize the wrong done to the minor child or to in any degree condone it. But we feel that the wrong may be ascribed more to the follies of youth in this era of confusion and frustration than to a wicked and depraved heart.

State v. Telavera, 76 Ariz. 183, 187, 261 P.2d 997, 1000 (1953) (Phelps, J.).

We must also recognize that sexual conduct among post-pubescent teenagers is not uncommon. Other courts have taken such notice:

> It is a fact that many young people male and female, engage in sexual intercourse. In 1976, 2.7% of all 16-year-old girls in the United States, and 6.4% of all 17-year-olds, had borne at least one child. U.S. National Center for Health Statistics, Vital Statistics of the United States, Table 1-17 (1978). About half of these children were illegitimate. Id., Table 1-32. These statistics, including those on abortions (331 reported for every 1,000 live births, U.S. Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 56 (1977)), indicate that a great number of unmarried 15- and 16-year-olds have engaged in sexual intercourse resulting in pregnancy and suggest that a greater number have done so without pregnancy.
>
> Without applauding the sexual permissiveness of the times, we can only note that in the social context of the times this type of offense between young people is committed many times without criminal prosecution and that, in ordinary sentencing practice, is not regarded as so serious as to require imprisonment.

State v. Sepulvado, 367 So. 2d 762, 771 (La. 1979).

Measuring the gravity of the offenses in this context, we must compare the harshness of the penalty. The legislature has imposed mandatory minimum consecutive sentences of 15 and 25 years for the first and second acts of consensual sexual conduct with a minor, with no possibility of early release. The trial court thus had no discretion to reduce the penalty according to the individual circumstances that indicated a less serious offense or a less culpable defendant. Defendant, with no prior felony history, has received a 40-year penalty for sexual conduct with two consenting post-pubescent teenagers. The broad application of the statute to encompass this situation results in a penalty grossly out of proportion to the severity of the crime. Although such a harsh penalty may be justified in the

context of other, more heinous crimes included within the sentencing scheme, it is not justified under the specific circumstances of this case.

B. Sentences Imposed for Other Crimes in Arizona

We next examine the sentences imposed in Arizona on defendants who commit crimes more serious than this defendant's. Solem, 463 U.S. at 292; Jonas, slip op. at 19. We have previously disapproved the practice of comparing only those crimes encompassed within the challenged sentencing statute to conclude that the punishment is proportionate because all crimes within the statutory scheme receive the same penalties. See Jonas, slip op. at 19-20, disapproving the analysis in State v. Smith, 156 Ariz. at 526, 753 P.2d at 1182, and State v. Crego, 154 Ariz. at 280, 742 P.2d at 291.

However, a comparison of the other crimes punishable under the same mandatory sentencing provisions of A.R.S. § 13-604.01 is helpful in this case to show that more serious offenses do not receive any greater punishment. For example, second degree murder, forcible sexual assault, taking a child for the purposes of prostitution, or involving a child in a drug offense are all considered first degree crimes against children, subject to the same mandatory minimum sentences of 15 and 25 years that defendant received. A.R.S. § 13-604.01(A), (D). More potentially serious crimes than those committed here, such as aggravated assault, child molestation, child abuse, or kidnapping, are subject to a lesser minimum sentence of 12 years for the first offense and 23 years for the second offense. See A.R.S. § 13-604.01(B), (D).

Other more serious crimes that do not involve children similarly receive lesser penalties than those mandated in this

case. Class 2 felonies not involving a dangerous weapon or threatened physical injury are punishable for a first offense with a minimum term of 5.25 years, a presumptive term of 7 years, and a maximum of 14 years, with early release potentially available after only half the sentence has been served. A.R.S. §§ 13-701, -702. Such first-time offenders are eligible for probation, or, if imprisoned, can earn early release credits of 1 day for each 2 days served. A second offense carries a minimum term of 7 years, a presumptive term of 10.5 years, and a maximum of 21 years, with early release potentially available after two-thirds of the sentence has been served. A.R.S. §§ 13-701, -702, -604(B). The first and second sentences are presumed to run consecutively but the trial court has discretion to make them concurrent by stating its reasons on the record. A.R.S. § 13-708. Included within

this scheme of punishment for class 2 felonies are the following crimes, all potentially more serious than the offenses committed by this defendant: kidnapping, A.R.S. § 13-1304; sexual assault of an adult, A.R.S. § 13-1406; first degree burglary of a residential structure, A.R.S. § 13-1508; and arson of an occupied structure, A.R.S. § 13-1704. Additionally, manslaughter, a class 3 felony, A.R.S. § 13-1103, is punishable with a minimum sentence of 3.75 years, a presumptive term of 5 years, and a maximum term of 10 years. A.R.S. §§ 13-701(C)(2), -702(B).

We also compare the circumstances under which other defendants have been subjected to the same mandatory sentencing scheme. In State v. Taylor, we upheld an aggregate prison term of 2,975 years for 85 counts of dangerous crimes against children. 160 Ariz. 415, 773 P.2d 974 (1989). In that case, the defendant performed and

photographed various sexual acts with children aged from 18 months to 8 years old, and many other unidentified small children. He also had a prior criminal history of sex crimes with young children in two other states. We recognized the "irreparable harm which he has caused to the normal development of numerous children," and his inability "to control his proclivity for sexual conduct with children" as important factors justifying the harshness of the sentence. Taylor, 160 Ariz. at 423, 773 P.2d at 982. In State v. Crego, the court of appeals upheld two consecutive 20-year prison terms for a defendant who molested 3 different victims under age 15 a few months after he had been released from prison for a similar offense, and while he was on parole. 154 Ariz. at 279, 742 P.2d at 290. In State v. Smith, the court of appeals also upheld a mandatory prison sentence of 91 years for a defendant who

repeatedly molested a 10-year-old boy and photographed the numerous incidents on approximately 60 occasions. 156 Ariz. at 520, 753 P.2d at 1176. Defendant also points out other cases in which harsh sentencing provisions were appropriately applied in situations involving repeated and cruel sexual offenses against small children. See, e.g., State v. Cummings, 148 Ariz. 588, 716 P.2d 45 (App. 1985) (defendant, a scoutmaster, performed multiple acts of oral and anal sex on 12- to 13-year-old male victims; was sentenced to 5 concurrent prison terms ranging from 7 to 15.75 years); State v. O'Neill, 117 Ariz. 343, 572 P.2d 1181 (1977) (defendant, while baby-sitting, molested a two-year-old infant, resulting in a tear between her vagina and rectum; was sentenced to 20 years to life). These and other cases stand in stark contrast to the circumstances under which

this defendant was sentenced in this case.

We conclude that a comparison of the punishments imposed for other crimes in Arizona reveals the disproportion with which defendant was sentenced under these factual circumstances.

C. Sentences Imposed for the Same Crime in Other States

We also examine the punishment imposed for the same crime in other jurisdictions. Solem, 463 U.S. at 292. This comparison is difficult because the offenses defendant committed are chargeable as a broad variety of crimes with varying punishments. However, we have attempted to compare penalties for the crimes closest to those committed here: consensual, nonincestuous, heterosexual intercourse with a 14-year-old.

Additionally, we compare each of defendant's sentences individually, keeping in mind that the 15-year sentence was imposed for a first offense, and that the 25-year sentence was imposed for a second offense. We also consider only those sentences imposed for a defendant with no prior felony convictions, other than the first offense used as an enhancement factor for the second offense. Our focus is necessarily on the mandatory minimum sentences imposed in other jurisdictions, because that is what defendant received here. We do not consider significant the state's argument that defendant could have received maximum sentences in other jurisdictions greater than the minimums imposed in this case, because the record clearly indicates that the trial court did not find aggravating factors justifying maximum sentences under these circumstances.

(1) 15-year Sentence for First Offense

In 10 jurisdictions, defendant's offenses would either not be a crime or would be punishable only as a misdemeanor with a sentence of less than one year and/or a fine.[4] For a first felony offense in the remaining jurisdictions, defendant would have faced a minimum

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[4] See Ark. Stat. § 5-14-106 (third degree carnal abuse, a class A misdemeanor); Cal. Penal Code § 261.5, 264 (unlawful sexual intercourse); Ga. Crim. Code § 26-2010 (fornication); Haw. Rev. Stat. § 707-732 (sexual abuse in the third degree); Ill. Crim. Code § 11-4.1 (contributing to the sexual delinquency of a child); Md. Ann. Code § 27-464(C) (fourth degree sexual offense); Mo. Rev. Stat. § 566.030 (not a felony; age of consent is 14); Pa. Stat. Ann. § 18-3122 (not a felony; age of consent is 14); S.C. Code Ann. § 16-3-655 (not a crime; age of consent is 14); W. Va. Code Ann. § 61-8B-9(a) (sexual abuse in the third degree).

penality of one, two, or three years,[5] with probation often available. Thus,

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[5]Felony penalties for a first offense in other jurisdictions include the following sentencing ranges: Ala. Code § 13A-6-62 (2 to 20 years); Alaska Stat. §§ 11.41.434, 12.55.125 (1 to 10 years); Colo. Rev. Stat. §§ 18-3-403, 18-1-105 (2 to 8 years); Conn. Gen. Stat. § 53a-71(1), 53a-35a (1 to 10 years); Del. Code. Ann. tit. 11 §§ 773, 4205 (3 to 30 years); Fla. Stat. Ann. §§ 800.04, 775.082 (1 to 15 years); Idaho Code §§ 18-6101, 18-6104 (1 year to life); Ind. Code. Ann. §§ 35-42-4-3(c), 35-50-2-6 (2 to 8 years); Iowa Code § 709.4 (1 to 10 years); Kan. Crim. Code Ann. §§ 21-3503, 21-4501 (3 to 20 years); Ky. Rev. Stat. Ann. § 510.060 (1 to 5 years); La. Rev. Stat. Ann. § 14:80 (1 to 10 years); Me. Rev. Stat. Ann. tit. 17-A, §§ 254, 1252(b) (1 year); Mass. Gen. Laws Ann. Ch. 265, § 23 (1 year to life); Mich. Comp. Laws § 28.788(4)(a) (1 to 15 years); Minn. Stat. Ann. § 609.344(1)(b)(2) (1 to 15 years); Miss. Code Ann. § 97-5-21 (1 to 10 years); Mont. Code Ann. § 45-5-503(3)(a) (2 to 40 years); Neb. Rev. Stat. § 28-319 (1 to 50 years); Nev. Rev. Stat. §§ 200.364(3), 200.368(1) (1 to 10 years); N.H. Rev. Stat. Ann. §§ 632-A:3, 651:2 (1 to 7 years); N.J. Rev. Stat. §§ 2C:14-2(c)(5), 2C:43-6.a, b(2) (2 to 10 years); N.M. Stat. Ann. §§ 30-9-13(B), 31-18-15 (1 to 2 years); N.Y. Penal Law §§ 130.25, 70.00(e) (1 to 4 years); N.C. Gen.

our statute is unique among all jurisdictions in that it imposes a minimum mandatory term of 15 years, which is 5 times higher than that imposed in any other jurisdiction. In all

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[5](continued)
Stat. §§ 14.202.1, 14-1.1(8) (1 to 10 years); N.D. Cent. Code §§ 12.1-20-03, 12.1-32-01.3 (1 to 15 years); Ohio Rev. Code Ann. §§ 2907.04, 2929(A)(3)(a) (1 to 2 years); Okla. Stat. Ann. §§ 1114(B), 1116 (1 to 15 years); Or. Rev. Stat. §§ 163.355, 161.605 (1 to 5 years); R.I. Gen. Laws §§ 11-37-6, 11-37-7 (1 to 5 years); S.D. Codified Laws § 22-22-1(5) (1 to 15 years); Tenn. Code Ann. § 39-2-605 (1 to 5 years); Tex. Penal Code Ann. § 22.011 (2 to 20 years); Utah Code Ann. §§ 76-5-401(1), 76-3-203(3) (1 to 5 years); Vt. Stat. Ann. tit. 13 § 3252 (1 to 20 years); Wash. Rev. Code §§ 9A.44.079, 9.94A.310, table 1 (1 to 5 years); Wis. Stat. Ann. § 940.225(2)(e) (1 to 10 years); Wyo. Stat. §§ 6-2-304, 6-2-306(iii) (1 to 5 years); D.C. Code Ann. §§ 22-2801, 24-203 (1 year to life).

jurisdictions but Arizona, the sentencing judge has a wide range of discretion in imposing a sentence at the bottom of the statutory range that fits the individual circumstances of the crime. Although the maximum allowable sentence in some jurisdictions would have fallen within the range of sentencing provided for a first offender under A.R.S. § 13-604.01(A), in no jurisdiction would the sentencing judge be required to impose a sentence of more than 3 years for the identical offense. Thus, our legislature has mandated a penalty potentially disproportionate to an individual criminal act or defendant. See J. Howe, Thoughts on Mandatory Sentencing, Ariz. Bar J. June-July 1985, at 24-25.

Such potential disproportionality is not enough to allow us to find defendant's sentences cruel and unusual. See State v. Taylor, 160 Ariz. 415, 773

P.2d 974 (1989) ("Although on the national spectrum Arizona deals with crimes against children more severely than many other states, '[t]he Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how to best administer its criminal laws.' Spaziano v. Florida, 468 U.S. 447, 464, 104 S. Ct. 3154, 3164, 82 L. Ed. 2d 340, 355 (1984)"). Such potential differences in sentencing are "a mark of federalism, not unconstitutionality." State v. Bishop, 717 P.2d 261, 272 (Utah 1986).

In this case, however, the potential disproportion between the sentences defendant received and those sentences actually imposed on other similarly situated defendants in other jurisdictions is actual. Defendant has supplied us with a myriad of examples in the published case law of other jurisdictions. A few representative

citations illustrate his point: Diefenderfer v. State, 745 P.2d 556 (Wyo. 1987) (defendant pleaded guilty to third degree sexual assault of a girl under 14; the execution of his sentence of 3 to 5 years suspended and 4 years probation imposed); State v. DeJesus, 10 Conn. App. 591, 524 A.2d 1156 (1987) (defendant pleaded guilty to second degree sexual assault of a 14-year-old; sentence of 5 years upheld); State v. La Borde, 234 La. 28, 99 So. 2d 11 (1958) (defendant convicted of carnal knowledge of 14-year-old; sentenced to one year, 9 months); State v. Smart, 247 La. 174, 170 So. 2d 365 (1965) (defendant convicted of carnal knowledge of a 13-year old; sentenced to 3 years); State v. Rodriguez, 179 N.J. Super. 129, 430 A.2d 957 (1981) (defendant convicted of sexual assault of a 13-year old; sentenced to 4 years); State v. Newell, 348 S.E.2d 158 (N.C. 1986) (defendant convicted of taking

indecent liberties with a consenting child between 13 and 16; sentenced to 3 years); State v. Hartman, 145 Wis. 2d 1, 426 N.W.2d 320 (1988) (defendant convicted of statutory rape of a 14-year old; sentenced to a term of not more than 3 years, but suspended and defendant placed on probation with 6 months in county jail work release program). Additionally, defendant's appellate counsel has avowed to the court that he "has diligently searched two centuries of case law of each of our 50 sister states. This required the review of just over 2,600 cases. Not one case was found where a similarly situated defendant received an aggravated sentence remotely comparable to that imposed as a mandatory minimum upon Mr. Bartlett."

Given this authority, we conclude that the mandatory minimum sentence imposed on defendant for his first offense was disproportionate to sentences received by

similarly situated defendants in other jurisdictions.

(2) 25-year sentence for second offense

A comparison of the 25-year mandatory minimum sentence defendant received for the second offense with those imposed in other jurisdictions is complicated by the enhancement of defendant's second sentence because the first count was treated as a prior predicate felony. Most jurisdictions punish repeat offenders more stringently, and enhancement of penalties on the basis of prior offenses has been consistently upheld against eighth amendment attacks. See, e.g., Rummel, 445 U.S. at 276; Cocio v. Bramlett, 872 F.2d 889, 893 (9th Cir. 1989). However, we are mindful that the legislature, in requiring a 25-year minimum sentence for a second offense, implicitly assumed that it was enhancing a constitutionally proportionate minimum sentence of 15 years for a first offense.

We have already found the minimum sentence for the first offense to be disproportionate to the facts of this case. Additionally, the "prior" felony in this case was one for which defendant was simultaneously tried and sentenced with the second offense, a factor not existing in other jurisdictions. See A.R.S. § 13-604(H).

Also complicating our analysis is the mandatory consecutive nature of the two sentences, along with the absence of the availability of parole. We have previously refused to find the consecutive nature of two sentences for two separate crimes to be a factor that would render the second sentence disproportionate. Jonas, slip op. at 18. We thus do not consider that factor here.[6] Nonavailability of parole,

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[6] We do not hold, however, that we would never consider the requirement of consecutive sentences to be a factor in

however, is a factor in determining proportionality, although the absence of parole, in itself, does not make a sentence disproportionate. Solem, 463 U.S. at 297 and n.24; Jonas, slip op. at 18. In this case, the absence of parole availability requires us to consider that defendant will serve the entire 25-year sentence for the second offense.

Despite these difficulties, a comparison of what penalties defendant would face for a second offense in other jurisdictions, although not as clear as the comparison for a first offense, compels the conclusion that defendant would be subject to a much lighter

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(Footnote 6 continued) determining proportionality. This is not, for example, a case in which consecutive sentences were imposed on a defendant who engaged in one single course of conduct that resulted in separate repetitive crimes with consecutive sentences. In such a case, the consecutive nature of the sentences would perhaps be a factor in deciding proportionality.

minimum mandatory sentence for his second offense in all but one state.

In Nebraska, defendant would be subject to a statutory range of 25 to 50 years for a second conviction of sexual assault involving a consenting child less than 16 years old, and would not be eligible for parole. Neb. Rev. Stat. § 28-319(1)(c), (3). However, as the United States Supreme Court noted in Solem v. Helm, a finding that a defendant could have received an identically harsh sentence in one other state is also a clear indication that he "could not have received such a severe sentence in 48 of the 50 states." 463 U.S. at 299 (emphasis added). Furthermore, we have not been advised by the state of any defendant charged in Nebraska with offenses similar to Bartlett's actually receiving such a harsh sentence. Rather, the published cases that we have found challenging the mandatory Nebraska

sentence for a second offense have involved more heinous offenses, including forcible rape with serious physical injuries to the victim. See, e.g., State v. Brand, 219 Neb. 402, 363 N.W.2d 516 (1985) (defendant received 35-year sentence for his second conviction of first-degree sexual assault involving the use of force; sentence found not disproportionate to crime). Under these circumstances, we cannot find the 25-year mandatory minimum sentence for defendant's second offense to be proportionate merely on the basis of the Nebraska statue.

Except for Nebraska, no other jurisdiction imposes a mandatory minimum sentence of more than 10 years for a second offense similar to defendant's. In no jurisdiction did we find the particularly harsh combination of provisions present here, including both mandatory consecutive sentencing and

nonavailability of parole. We must conclude, therefore, that the 25-year mandatory minimum imposed for defendant's second offense is also disproportionate to the sentences imposed on similarly situated defendants in other jurisdictions.

Based on the above analysis, we hold that defendant's sentences of 15 years for the first offense and 25 years for the second offense are disproportionate to the crimes he committed under the specific facts of this case, and thus violate the eighth amendment proscription against cruel and unusual punishment. This is a narrow holding limited to the facts and circumstances of this case. The Supreme Court has said that successful challenges to the proportionality of particular sentences are "exceedingly rare." Solem, 463 U.S. at 289-90. This is such a rare case.

3. Cruel and Unusual Punishment under the Arizona Constitution

Although this court requested additional briefing on whether defendant's sentence violated either the federal or state constitutional provisions prohibiting cruel and unusual punishment, neither party analyzed the state constitutional provision separately from the federal grounds.

Article 2, § 15 of the Arizona Constitution is identically worded to its federal counterpart prohibiting cruel and unusual punishment. The framers of the Arizona Constitution, "in a rare case of using the federal Constitution as a model," adopted the federal wording "cruel and unusual punishment" over the committee's proposed wording that neither "cruel nor unusual punishment" should be permitted. J. Leshy, The Making of the Arizona Constitution, 20 Ariz. St. L.J. 1, 85 and n.524 (1988), citing Journal of

the [Arizona] Constitutional Convention 463 (Con. P. Cronin Comp. 1925). This deliberate adoption of the federal wording expressed the framers' intent to give legislators wide discretion in imposing methods of capital punishment. See S. Feldman & D. Abney, The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution, 20 Ariz. St. L.J. 115, 122 (1988).

Here, where identically worded federal and state constitutional provisions are alleged to have been violated, when the parties do not argue that the state constitution provides greater protection than does the federal analog, and when we have already found a violation of the federal counterpart, we need not address whether defendant's sentences would have violated the Arizona constitution had they not violated the eighth amendment.

Having concluded that the sentences imposed in this case violate the eighth amendment prohibition against cruel and unusual punishment, we do not address whether they violate art. 2, § 15 of the Arizona Constitution.

Disposition

In his petition for review, defendant argues that we should reduce his sentence to one more proportionate to his crime pursuant to our authority to reduce excessive sentences under A.R.S. § 13-4037(B), which provides:

> If, in its opinion, the conviction is proper but the punishment imposed is greater than under the circumstances of the case ought to be inflicted . . . the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. . . .

The ability to impose "any legal sentence" necessarily implies that we are limited to reducing an excessive sentence to one within the statutory range enacted by the legislature, assuming that range

is constitutional. See Wahl v. State, 39 Ariz. 62, 3 P.2d 1052 (1931); State v. Gourdin, 156 Ariz. 337, 751 P.2d 997 (App. 1988) (a sentence not authorized by law is illegal). Indeed, in prior cases in which we have reduced an excessive sentence under authority of A.R.S. § 13-4037 or its predecessor, A.R.S. § 13-1717, we have imposed a sentence within the range of sentencing provided by the legislature. See, e.g., State v. Telavera, 76 Ariz. 183, 261 P.2d 997 (1953) (excessive sentence of 10 to 20 years reduced to 7 to 10 years); State v. Seelen, 107 Ariz. 256, 485 P.2d 826 (1971); State v. Flores, 108 Ariz. 231, 495 P.2d 461 (1972); State v. Waldrip, 111 Ariz. 516, 533 P.2d 1151 (1975).

In this case, however, we hold that the statutory range of sentencing under A.R.S. § 13-604.01 cannot constitutionally be applied to defendant's crimes under the facts and

circumstances of this case. We therefore have no available "legal" sentence within the range of A.R.S. § 13-604.01 to impose on defendant.

The state argues that if we find defendant's sentences unconstitutionally cruel and unusual, "appellant must be set free, as he has committed a crime for which there would be no punishment." The state basis its position on the assumption that the underlying substantive offense of sexual conduct with a minor, prohibited by A.R.S. § 13-1405, is so "inextricably united" with the sentencing provisions of A.R.S. § 13-604.01, that sentencing defendant under any other provision of the law would "undermine the intent of the entire statutory scheme." We cannot agree with this proposition.

We do not invalidate defendant's convictions for two counts of sexual conduct with a minor under age 15. Such

offenses have been validly designated class 2 felonies by the legislature. Neither do we hold the sentencing provisions of A.R.S. § 13-604.01 unconstitutional as applied to other defendants under different circumstances. We merely hold that the sentencing provisions of A.R.S. § 13-604.01, which are more stringent than those applied to other class 2 felons, cannot be applied constitutionally to this defendant under these facts and circumstances. The result is to bar application of those provisions to this case, leaving defendant to be sentenced the same as any other class 2 felon to whom the provisions of A.R.S. § 13-604.01 would not apply. Thus, under the remaining statutory range provided for class 2 felonies in A.R.S. §§ 13-701 and -702, defendant could be sentenced within the range that would include, for the <u>first</u>

offense, a minimum term of 5.25 years, a presumptive term of 7 years, and a maximum term of 14 years, of which he would have to serve at least one-half before any possible release. As a first-time nondangerous offender, he would be eligible for probation. For the second offense, defendant's sentence could be enhanced by the first offense, see A.R.S. § 13-604(H), within the range that would include a minimum term of 7 years, a presumptive term of 10.5 years, and a maximum term of 21 years. See A.R.S. § 13-604(B). Defendant would not be eligible for probation for the second offense, and would have to serve at least two-thirds of any sentence imposed before release. A.R.S. § 13-604(B). Defendant's sentences would run consecutively unless the trial court stated on the record its reasons for imposing concurrent sentences. A.R.S. § 13-708.

Such a sentencing scheme can be applied validly to this defendant as a class 2 felon. This wide discretionary range of sentencing will enable the trial court to proportionately tailor the harshness of the penalty to the severity of the crimes. Because we cannot discern from the record before us what sentences the trial court would have imposed had it not felt bound by the mandatory provisions of A.R.S. § 13-604.01, we remand this matter to the trial court for resentencing in accordance with this opinion. We also vacate that portion of the court of appeals memorandum decision that is inconsistent with this opinion.

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Robert J. Corcoran, Justice

CONCURRING:

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Frank X. Gordon, Jr., Chief Justice

_____
Stanley G. Feldman, Vice Chief Justice

James Duke Cameron, Justice

James Moeleer, Justice

APPENDIX C

13-604.01. Dangerous crimes against children; sentences; definitions

A. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving second degree murder, sexual assault, taking a child for the purpose of prostitution, child prostitution or sexual conduct with a minor or involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

B. Except as otherwise provided in this section, a person who is at least

eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or kidnapping shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

C. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving sexual abuse shall be sentenced to a

presumptive term of imprisonment for ten years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years.

D. The presumptive sentences prescribed in subsections A, B and C of this section may be increased or decreased by up to five years pursuant to the provisions of § 13-702, subsections C, D and E.

E. A person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served.

F. A person who stands convicted of any dangerous crime against children in the first degree having been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31-233, subsection A or B until the person has served not fewer than thirty-five years.

G. Notwithstanding chapter 10 of this title,[1] a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree is guilty of a class 3 felony and shall be sentenced to a persumptive term of imprisonment for ten years. The

presumptive term may be increased or decreased by up to five years pursuant to § 13-702, subsections C, D and E. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis until the person has served not less than one-half the sentence imposed by the court.

H. Section 13-604, subsections H and I apply to the determination of prior convictions.

I. In addition to the term of imprisonment imposed pursuant to this section and notwithstanding any other law, the court shall order that a person convicted of any dangerous crime against children in the first degree be supervised on parole after release from confinement on such conditions as the court or the board of pardons and paroles deems appropriate for the rest of the

person's life. If the person is convicted of any dangerous crime against children in the second degree the court, in addition to any term of imprisonment imposed or in lieu of the term if probation is otherwise authorized, may order that the person convicted be supervised on probation or on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for any term up to the rest of the person's life.

J. The sentence imposed on a person by the court for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time.

K. In this section:

1. "Dangerous crime against children" means any of the following committed

against a minor under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as defined in § 13-3623, subsection B, paragraph 1.

(i) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in § 13-3206.

(l) Child prostitution as defined in § 13-3212.

(m) Involving or using minors in drug offenses.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense.

2. "Predicate felony" means any felony involving child abuse, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Added by Laws 1985, Ch. 364, § 6, eff. May 16, 1985. Amended by Laws 1987, Ch. 166, § 1; Laws 1987, Ch. 307, § 4.

[1]Section 13-1001 et seq.

APPENDIX D

Minutes of Meeting
COMMITTEE ON JUDICIARY
February 18, 1985

Chairman Skelly announced that H.B. 2145 would be assigned to the Liquor Subcommittee for evaluation and that the members of the Subcommittee are:

Mrs. Wright, Chairman

Mrs. Hermon

Mr. Kromko

Mrs. Rosenbaum

Mr. Skelly

Chairman Skelly stated that the Elections Subcommittee consisting of:

Mrs. Hermon, Chairman

Mr. Hanley

Mr. Higuera

Mr. King

Miss Rockwell

would be assigned the following bills for evaluation:

H.B. 2289, election officer certification programs

H.B. 2489, candidates; residency requirements

H.B. 2500, drivers' license as voter registration

H.B. 2514, election code revisions

H.B. 2516, presidential electors; appointment

H.B. 2548, unfair campaign practices

Chairman Skelly announced that Mr. Hanley was excused to attend a funeral.

S.B. 1021, sexual offenses; child victims.

Chairman Skelly stated that this would be the only bill on the agenda and that a

strike-everything amendment would be offered. Chairman Skelly made the following statement to the members of the Judiciary Committee and to those in the audience:

> "Crimes against children have increased by epidemic proportions not only in the State of Arizona but throughout our Nation. According to an article in the Arizona Republic, February 17, 1985, child abuse has increased 35 percent nationally in the last year. Current figures for the City of Phoenix show that in 1984 as compared to 1983, assaults and aggravated assaults against minors increased by 36 percent, and although rape against minors decreased by four percent, other sex offenders against minors increased by 18 percent. It is not necessary to reiterate to you the tragic happenings in Tucson and Tempe. It is important to note, that Frank Jarvis Atwood has a long history of child molestation and had been released on parole after only serving a short sentence. In addition, Mr. Castaneda was also released on parole and we all know what happened to the little Perry boy.

> I think it is timely that this month's Reader's Digest printed an article entitled, "Why Do We Tolerate These Crimes Against Children?" (Attachment B)
>
> For the edification of the Committee, my office received telephone calls from people who are currently being counseled in the program, Parents United. Both of these individuals are child molesters, and both spoke against the legislation because they said that ". . . some of these little girls look for this." This same individual also said ". . .would you deprive a family of the father just because he has a particular problem with a particular child?"

Chairman Skelly stated that Steve Twist, Attorney General's office, would explain the strike-everything amendment to the committee. (Attachment C)

Steve Twist, Assistant Attorney General, stated that he believes the Legislature needs to place a high priority on this type of legislation because of the nature

of these crimes. He further stated his belief that crimes against children has made many of our urban centers uninhabitable and causes many of us to have fear and frustration over the criminal justice system.

Representative Herstam testified that his original bill concerning fingerprinting of day care workers had been incorporated into the strike-everything amendment and that he supports the strike-everything amendment. He further stated that the need for fingerprinting is obvious since there are over 8,100 day care workers in the State of Arizona caring for over 50,000 children in 750 licensed day carecenters. Representative Herstam asserted that those individuals who have

the responsibility for caring for these children should have to pass basic safety precautions in order to provide a more secure atmosphere for the children in these centers.

Mr. Kromko questioned whether we should extend these security checks to Boy Scout groups, school teachers and other youth-oriented groups.

Mrs. Rhonda DePre' stated her support for the bill and informed the committee that although she is a member of We The People, she was speaking before the committee as a private citizen.

Judge Roger Rudman, Justice of the Peace, stated his support for the bill and

further commented that in his limited tenure as a Justice of the Peace, he is shocked at the number of bizzare and heinous crimes being committed dailyagainst children. Mr. Rudman further stated that recently he had a case where a child had been homosexually abused for over a year and had recently been murdered. Mr. Rudman urged the Committee to unanimously pass the bill.

Miss Joanne Browne spoke in support of the bill and read from a printed statement. (Attachment D)

George Mehl, Chairman, We The People, stated his support for the bill and urged the Committee to pass the bill in order to protect the lives of innocent children.

Al Heinze, Executive Director, Arizona Prosecuting Attorney's Counsel, stated his support for the strike-everything amendment and further stated that videotaping of testimony is not a new concept in the State of Arizona and that this bill simply allows this privilege to be extended to children.

Knox Kimberly spoke on behalf of Congressman John McCain and presented the Committee with a printed statement. (Attachment E)

Mr. Kromko expressed concern about the mandatory prison sentences for kidnapping because he believes that a lot of the kidnapping cases are between custodial and noncustodial parents.

Chairman Skelly assured Mr. Kromko that there is a different statute that covers custodial interference.

Earl Campbell, Executive Director, Arizona Chiefs of Police, stated his support for the strike-everything amendment and stated that he believes stronger laws are needed to protect our children.

Janet Judge voiced her support for the bill and made the following statement to the Committee:

> "My two children were victims of molestation by their natural father. It is very difficult to report these types of crimes because once you report it, you become a victim of the justice system. If the same crimes had been committed against adults,

justice would have been swift. My daughters have friends who have also been molested and they tell their friends not to report it because the system will not help them.

It has been my personal experience that there is no help for the victim and that it seems the system bends over backwards to help the perpetrator and that the molester is the only one the system helps in defending their rights. Why isn't it important to consider the rights of the victim? I have attended meetings at Parents United and what upsets me the most is that there is a lot of talk about feeling sorry for what is happening to the lives of the molesters but you very rarely heard anyone speak up in defense of the children. When I was passing around petitions it was difficult to get signatures quickly because almost everyone had a story to tell about a child they knew who had been molested. The 80,000 people who signed these petitions want the Legislature to know they want this bill passed so that the individuals committing these crimes are removed from the streets.

I am really afraid that the people who counsel child molesters do not

> place the blame on the molesters but make the children feel like they wanted to be a victim. I believe that a molester who doesn't feel like he has done anything wrong is very dangerous."

Chairman Kelly concurred with Ms Judge and further stated that it appears that the philosophy of many people is that if you commit these offenses you have one free shot at it because the State will bail you out.

Chairman Skelly emphasized that he could not accept the philosophy that an individual who molests his daughter for five or six years before he is caught is less guilty than a person who molests a child in the park.

Ms. Judge emphasized that even though it may be the first time a person is

arrested for this type of crime, the molester has usually been victimizing the child for a long period of time.

Barb McDougall spoke on behalf of her victimized daughter and voiced her support for the strike-everything amendment. She further emphasized that because her daughter was mentally retarded, the court had declared her incompetent to testify against the man who had molested her. She further stated that the man who had molested her daughter had previously molested his own daughter, had a criminal record, but had never served any time.

Ms McDougall demonstrated to the Committee the newspaper clippings she had

collected since May 1984 concerning cases of child molestation. Chairman Skelly stated that the record of the meeting should reflect that the newspaper clippings were on a roll of paper and that the roll encircled the Hearing Room.

Chairman Skelly stated that this emphasizes the epidemic proportions of the problem of child molestation.

Michael Hull, Director, Christy Ann Fornoff Foundation, stated his support for the bill and emphasized that a message needs to be sent to society that these crimes will not be tolerated.

Donna Colbert, Ex-Director, Las Familias, Parents United, commended the Committee

for addressing the various issues contained in the bill but expressed concern about how the bill would affect the victim's family.

Dr. John Johnson stated that he was not speaking in opposition to the bill but that he was urging the Committee to evaluate some information before they pass the bill. (Attachment F) Chairman Skelly asked Dr. Johnson if the current law that calls for a maximum of seven years had stopped the murder of Christy Fornoff. Dr. Johnson replied that it had not.

Kathy Swenson, Pima County Adult Probation Department, stated her hesitancy to speak against the bill and

wanted the Committee to know that she is concerned about the effects upon the families of the victims. She stated that she enjoys working with the children and that the responsibility for the molestation lies solely with the offender and that she does not condone the victimization of children.

Thad Curtis, Lieutenant, Pima County Sheriff's Department, stated that his organization was 100 percent in favor of passage of the strike-everything amendment. He further stated that the only opposition to the bill that he is aware of is coming from groups who counsel molesters. He emphasized that he believes the breakdown of the home begins when the child is molested, not when the

father is convicted of the crime.

Terry Raetz spoke in support of the bill and stated that nationwide, the statistics point out that there are approximately 400,000 molesters and that the average molester will victimize 70 children and that only one and one-half percent of convicted molesters will go to prison. She stated that her youngest daughter had been victimized by a man who told her that if she told anyone he would kill her and her mother. She expressed concern that because of the molestation, her daughter now has behavioral problems and worse of all, she has stated, ". . .I never want to grow up because adults don't do fun things." She further stated that her other girl came to her two years

ago and confessed that she too had been a victim. She expressed concern that her daughter is emotionally twelve years old and will be in therapy for the rest of her life. She urged the committee to pass the bill not only for the children of Arizona but to set a trend to protect all children.

Lee Fischler, Executive Director, Parents United, stated that his group is an international organization with local chapters in Arizona. He stated that he works with victims of molestation and that the subject of sexual abuse is a very complicated matter and that it is important that whatever kind of legal response is given, flexibility in the law should be guaranteed. He expressed

concern that if flexibility is eliminated, the Legislature would be destroying law.

Chairman Skelly requested that Mr. Fischler answer the following question with a yes or a no:

> "When you came to visit me at my office at Southwest Saving, I asked you where, in the grand scheme of crimes, did you rank incest? Your answer to me was: "it is like a bad cold." Did you or did you not say that?

Mr. Fischler responded that Mr. Skelly was misrepresenting his remarks and that Mr. Skelly hears only what he wants to hear.

Chairman Skelly stated that he had repeated back this response to Mr. Fischler five times and that he was

not misrepresenting his words and that he had very good hearing.

Chairman Skelly stated that for the edification of the Committee, he firmly believes in counseling for children and wives and for offenders while they are in prison. Chairman Skelly further stated that the Scottsdale Progress had printed an article entitled Who Is Raping The Children and proceeded to read several direct quotes attributed to Mr. Fischler. (Attachment G)

Chairman Skelly stated that he believes there is a school of thought through the United States that you can commit the most bestial, heinous crimes on your own children and when the whistle is blown on

you, all of a sudden you have salvation and you want counseling. He continued to say that this school of thought says that you can do these things for five or six years, sodomizing and molesting your children and when you are caught, you are somehow less guilty than the guy who is caught molesting a child he does not know. Chairman Skelly stated that he believes that is a sick, warped philosophy.

Shirley Carpenter stated her support for the bill and said it is her belief that it is time to take care of our children. She stated that her grandson was grabbed at a public park and that she chased the man in her car and when she caught up with him the man said he was only taking

the child to get a coke. She stated the law should take care of the child not the offender. She further emphasized that she is sick of the molestation and wants something done about the problem.

Kathleene Browne, Director, Organization For Child Development and and American's Children, spoke in support of the bill and urged the Committee to adopt the strike-everything amendment. She stated she is angry about our lack of protection for our children and emphasized that we must take the molestors and lock them up in order to protect the innocent.

Robert Burns, Arizona Association for Child Development and Education, stated

that he wanted the Committee to consider fingerprinting and screening requirements for all child care providers, including those who advertise such services who are not licensed.

Claud Heckman spoke on behalf of his grandchildren who are victims and urged the Committee to pass the bill and commented that he would like to see the bill with tougher language. He stated that his grandchildren begged him not to return them to their home and at the time he did not understand why. He further stated that a few months ago he took his two-year-old granddaughter to the emergency room where the doctors confirmed she had been raped. He expressed concern for the safety of his

grandchildren because although the father had been charged, the charges were dropped due to plea bargaining. He stated that his four-year old grandchild had said, "Daddy promised not to do it anymore Grandpa, but he still does it every day." Mr. Heckman requested that the Committee strengthen the laws so that plea bargaining is not a factor in sentencing these people who commit these crimes.

Noel Carpenter stated his support for the bill and told the Committee that his son and nephew were victims and that he wanted the Legislature to lock the molesters up forever. He stated that he believes that no matter how much counseling these people receive, they will never change.

Anito Mayo, We The People, stated her support for the bill and emphasized to the Committee that it seems that if a man robs a bank it is a crime but if a father robs a child of their innocence, it is negotiable. She questioned why our society encourages this school of thought.

Rachel Opinsky stated her support for the bill but expressed concern about portions of the bill. She provided the Committee with a written statement. (Attachment H)

Steve Goehring, Director, Citizens Against Sexual Assault, spoke in support of the bill and emphasized that he

believes the victims of molestation need protection under the law. He further stated that he believes this bill takes a positive step forward for the State of Arizona. He informed the Committee that Adam Walsh's father had been in the City of Phoenix and that Mr. Walsh had stated that Arizona's laws needed to be brought from 1954 to the 1980's. (Attachment I)

Debbie Carlson, Mother of Vicki Lynn Hoskinson, stated that her daughter had disappeared five months ago Sunday, February 17, 1985 or 155 days today. She made the following comments to the Committee:

> "I could never tell you the anguish and grief our family, friends and Vicki's classmates have suffered through since her disappearance. It is time we realize we need to protect our

children because they are our future. If we do not protect our children, what will it be like fifteen years from now? It has broken my heart and above all else in this world, I want my child back.

In answer to those who call for treatment, how come, Frank Jarvis Atwood was released on parole after so-called treatment, he allegedly kidnapped by daughter. He has a long history of child molestation. He is a pedophyle.

We are being accused of being organized due to emotionalism Well, the only right we seem to have left is emotionalism. I stand before this Committee today to tell you something has to be done. We need to lock up these molesters so that we don't have any more Vicki Lynns, Christie Fornoffs or Perrys. There is no price you can place on a child's life."

Mr. King moved, seconded by Mrs. Wright,

that S.B. 1021, do pass.

Mr. King moved, seconded by Mr. Denny,

that the strike-everything amendment be

adopted. The motion carried.

(Attachment J)

Chairman Skelly stated that a technical amendment was before the Committee and he urged the Committee to adopt it.
Mr. King moved, seconded by Mrs. Wright, that the printed amendment dated 2/18/85, 10:45 a.m. be adopted. The motion carried. (Attachment K)

Mrs. Wright expressed concern that the bill deals with child molestation in the home just as it is dealt with outside the home.

Mr. Giordano stated that he believes that child molestation is becoming more of a problem because there is more of an

acceptance of sexual perversion in our society. He emphasized that he believes it goes back to the disregard for unborn children and that society seems to promote the philosophy of the strong over the weak.

Mr. King moved, seconded by Mrs. Wright, that S.B. 1021, as amended, do pass. By a roll call vote of 13-0-0-2, the motion carried. (Attachment L)

Without objection, the meeting adjourned at 11:30 a.m.

(Attachments are on file in the Office of the Chief Clerk and the Committee Secretary)

APPENDIX E

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROL ELIGIBLE
* ALABAMA	13 A-6-62 Class B Felony Rape 2° 13 A-6-61 Class A Felony	12-16 yrs < 12 yrs	≠ > 20, or < 2 yrs Life or ≠ >99 yrs, nor < 10 yrs	Habit. offenders (> 1 conv.) If Class B Felony, treated as Class A; if Class A, Life or ≠ > 99 yrs, nor < 15 13-A-5-9	Yes.	Yes.
* ALASKA	11.41.434 1° sexual abuse of a minor 11.41.438 2° sexual abuse of a minor Class B Felony	< 13 yrs 13, 14 or 15 yrs	§ 12.55.125 ≠ > 30 yrs; if 1st conv., 8 yrs; if 2nd, 15 yrs; if > 2, 25 yrs/≠ > 10 yrs, nor < 4 yrs, if 2nd conviction	Mandatory if 1° or 2nd offense Sentence not suspendable	Consecutive available.	Not if 2nd offense.
* ARIZONA	13-1405(B) Class 2 Felony Punishable under 13-604.01 Class 6 Felony	< 15 yrs > 15 yrs	15, 20, 25 13-604.01	15 min. -- if 2nd offense, 25 min. 20 pres. / 25 agg. can get between 40 - 60 yrs for 2 offenses	Yes (Mandatory).	Not until sentence serve
ARKANSAS	5-14-104 Class B Felony (1° carnal abuse) 5-14-106 Class A Misdemeanor (3° Carnal Abuse)	< 14 yrs < 16 yrs; Defendant > 20 yrs	≠ < 5 yrs nor > 20 yrs ≠ > 1 yr	If convicted of > 1 Felony, ≠ < 10 nor > 30 yrs.	Yes, if ordered. Aggreg. of consecutive terms for misde meanors ≠ > 1 yr.	
CALIFORNIA	261.5 Unlawful sexual intercourse with female under 18 yrs	< 18 yrs	≠ > 1 yr + possible fine ≠ > $70.00	If subsequent offense tried separately, enhance by 5 yrs to run consecutive.	If subsequent o fense.	No probation if 2 or mor felonies.
COLORADO	18-3-403 Sexual assault on child Class 4 Felony	< 15 yrs	≠ < 2 yrs nor > 8 yrs or ≥ 1 day or life 18-1-105	Mandatory -- sex offenders may be sentenced to indeterminate terms if 3 convictions, ≠ < 25, nor > 50 yrs. 16-13-101	Yes, in court's discretion.	Possible when Parole Board thinks he's ready after serves sentence imposed less credit for good time.
CONNECTICUT	§ 53a-71 Sexual assault in 2° Class C Felony	< 16 yrs	≠ < 1 nor > 10 yrs § 53 a-35a	9 mo's ≠ suspendable or reduceable Determinate sentencing.		

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* DELAWARE	§ 773 Unlawful sexual intercourse in 3° -- Class B Felony	< 16 yrs	3-30 yrs + fine	4 time offender -- Life imprisonment in court's discretion. If multiple offender, may receive sent. > max. for 1st offense on subsequent offense.		Yes, but not after 3rd conviction.
* DISTRICT OF COLUMBIA	22-2801 Carnal knowledge Sexual Intercourse 22-3501 Indecent acts with children. (No Intercourse)	< 16 yrs < 16 yrs	Any term of years or for life. Neither consent nor mistake of age = defense ≠ > 10 yrs	Yes. If 2nd offense, may receive 1 1/2 times max. prescribed for offense. 22-104. If > 2 priors, may receive life. 22-104a		Must serve minimum sentence.
* FLORIDA	§ 800.04 Sexual Battery 2° Felony 794.011(1)(h)	< 16 yrs < 12 yrs	≠ > 15 yrs Capitol offense - Life without parole for 25 yrs. Ignorance of age ≠ defense Consent ≠ defense	775.084 -- habitual offender increases penalty to ≠ > 30 yrs.		
* GEORGIA	16-6-3 Statutory Rape	< 14 yrs	≠ < 1 nor > 20 yrs	Subsequent offense gets max. for 2nd, subject to probation or suspension by court. 4th offense -- max. sent. and not eligible for parole.	Yes, in court's discretion.	On 4th conviction, no parole available.
HAWAII	707-736 Sexual abuse 1° Class C Felony 707-737 Sexual abuse 2° Misdemeanor	< 14 yrs 14-16	Indeterminate, but if repeated, 5 yrs. ≠ > 1 yr	If 2nd offense, 1 yr 8 mo. 706-606.5 If 3rd offense, 3 yrs 4mo. 3 priors, 5 yrs.	Yes, in court's discretion.	No parole if prior conviction.
* IDAHO	18-6101 Rape	< 18 yrs	≠ < 1yr to Life, In Court's discretion		Yes, in court's discretion.	
ILLINOIS	38-12-16 Agg. criminal sexual abuse Class 2 Felony	13-17 Defendant > 5 yrs older	≠ < 3 yrs nor > 7 yrs § 38-1005-8-1	If previous conviction 1005-5-3	Yes, in court's discretion. 1005-8-4	

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INDIANA	35-42-43 Child molestation Class C Felony	12 - 16 yrs	Fixed term of 5 yrs ± 3 yrs for aggravation or mitigation.	May suspend any part of sentence in excess of min.	If subsequent offense.	
* IOWA	709.4 Sexual abuse in 3° Class C Felony	14 or 15 yrs Defendant 20 or 21 yrs or older	≠ < 10yrs + fine	Repeat offender = ≠ > 15 yrs	In trial court's discretion. 901.8	
* KANSAS	21-3503 Indecent liberties with child Class C Felony	< 16 yrs	Min: ≠ <3 yrs nor > 5 yrs Max: ≠ < 10 yrs nor > 20 yrs	If 2nd offense -- ≠ < least, nor 2 times greatest min. sent. for min. (up to 10) ≠ < least nor 2 x greatest max. sent. (up to 40)		
KENTUCKY	510.060 Rape in 3° Class D Felony	< 16 yrs Defendant > 21 yrs	≠ < 1 yr nor > 5 yrs	Court may reduce sent. if found unduly harsh to ≤ 1 yr.	In trial court's discretion.	Available.
* LOUISIANA	§ 80 Carnal knowledge of juvenile	12 - 17 yrs	≠ > 10 yrs	§ 529.1 Subsequent offense ≠ < 3.3 yrs or > 20 yrs. If 2 previous convictions, ≠ < 5 yrs or > 20 yrs.	Consecutive unless trial court directs concurrent. 883.	No parole or probation.
MAINE	17A 254 Sexual abuse of a minor Class D Felony	14 - 16 yrs	§ 1252. ≠ 1 yr			Probation available. ≠ > 1 yr.
MARYLAND	§ 463 2° Rape -- Violent Crime 464C 4° Sexual offense Misdemeanor	< 14 yrs 14 or 15	≠ > 20 yrs ≠ > 1 yr or fine or both	3rd offense ≠ < 25 yrs for violent crime. 4th offense of violent crime gets life sentence. § 643B		≠ > 1 yr.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
* MASSACHUSETTS	265 § 23 Rape and abuse of child	< 16 yrs	Life or any number of yrs for 1st offense	If subsequent offense, ≠ < 5 yrs. up to life or any # of yrs.		
* MICHIGAN	28.788(4) Criminal sexual conduct in 3rd degree	13 - 16 yrs	≠ > 15 yrs	If subseqt, mand. min. of 5 yrs (pre - 1988). If subseqt, may get max. term ≠ > 22.5 yrs. If 3rd conviction may get 30 yrs.		No parole prior to serving min. sentece imposed. 28.2303(3)
MISSISSIPPI	§ 97-5-21 Seduction of child under 18	< 18 (previously chaste)	≠ > 10 yrs	If ≥ 2 priors, gets maximum	At trial court's discretion.	No parole or release, if 2 or > convictions. No probation, either.
MISSOURI	§ 566.040 Sexual assault in 1° Class C Felony	14 or 15 yrs	558.011 ≠ > 7 yrs	If > 2 Felonies, ≠ > 15 yrs	In trial court's discretion.	Probation available.
MINNESOTA	609.344 Criminal sexual conduct in 3°	13 - 16 yrs Defense if defendant believes victim ≥ 16 Consent ≠ defense	If Defendant ≤ 48 mo's older , ≠ > 5 yrs. If Defendant > 48 mo's older, ≠ > 10 yrs.	If subsequent offense, ≠ < 3 yrs., nor > max.	In trial court's discretion. Shall not exceed 40 yrs, unless life sentence.	Parole possible in D.O.C.'s discretion, after any period served.
* MONTANA	45-5-503 Sexual intercourse without consent	< 16 yrs	≠ < 2 yrs nor > 40 yrs + fine ≠ > $50,000	Subsequent offense: ≠ < 5 yrs nor > 100 yrs. 46-18-502		May not defer imposition of sentence. 46-18-201
* NEBRASKA	28-319 Sexual assault in 1° Class 2 Felony	< 16 yrs	1 - 50 yrs	2nd offense, ≠ < 25 yrs mandated. Sentences may be increased for habitual criminals.		Not eligible for parole on 2nd conviction.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
NEVADA	200.364 Statutory sexual seduction	< 16 yrs (consent)	≠ < 1 yr nor > 10 yrs + fine ≠ > $10,000	207.010 If ≥ 2 prior felony convictions, gets ≠ < 10 nor > 20 yrs.	In trial court's discretion. 176.035	
* NEW HAMPSHIRE	632-A:3 Felonious sexual assault Class B Felony	13 - 16 yrs	≠ < 1 yr nor > 7 yrs + fine ≠ > $2000	If 3rd offense, life imprisonment 651:6	Trial court has discretion.	After serving min. term, may receive parole. 651-A:6
* NEW JERSEY	2C:14-2 Sexual assault 2° Crime	13 - 16 yrs	10 - 20 yrs + fine ≠ > $100,000	2nd offense, must serve min. 5 yrs imprisonment without possibility of parole	In trial court's discretion.	2nd offender not eligible for non-custodial disposition.
NEW MEXICO	30-9-11(D) Criminal sexual penetration in 4° 4° Felony	13 - 16 yrs	18 mo's imprisonment (court may alter under other provisions) 31-18-15 fine = $5000	31-18-17 = habitual offender 2nd offense -- sentence increased by 1 yr. 3rd offense -- increase by 4 yrs. 4th offense by 8 yrs.		If 2nd offense, no suspension or deferral of sentence. Parole of 1 yr required after sentence served . 31-21-13.1
NEW YORK	§130.25 Rape in 3° Class E Felony	Victim < 17. Defendant > 21 yrs.	≠ < 1 yr nor > 4 yrs. (indeterminate)	2nd offense ≠ < 3 nor > 4	In trial court's discretion.	
NORTH CAROLINA	14-202.1 Taking indecent liberties with children Class H Felony	< 16 yrs	≠ > 10 yrs + fine	Conviction of 3 or more felonies = habitual criminal. Must serve min. 7 yrs without parole. 14-7.6. Classified Class C Felony -- up to 50 yrs or life or fine or both.	Yes, if habitual offender.	No parole for habitual offender for 7 yrs.
* NORTH DAKOTA	12.1-20-03. Gross sexual imposition Class A Felony	< 15 yrs	≠ > 20 yrs, + fine of ≠ > $10,000 or both	3rd offense, court may impose life sentence. 12.1 -32-09	In trial court's discretion.	Mandatory parole available only after entire sentence served.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
OHIO	§ 2907.4 Corruption of minor 3° Felony	12 - 15 yrs	2 yrs, 30 mo; 3 yrs or 4 yrs as minimum, to maximum of 10 yrs. (court sets definite term)	Habitual offender if 2 or more convictions	In trial court's discretion.	Probation in trial court's discretion.
* OKLAHOMA	21 § 1111 Rape 2° If < 16, but victim > 14	< 16 yrs	≠ < 1 yr nor > 15 yrs + fine ≤ $10,000 min. sentence ≠ < 1/3(Max)	If subsequent offense, ≠ < 10 yrs. If 3rd offense, ≠ < 20 yrs. § 51		Yes.
OREGON	163.355 Rape 3° Class C Felony	< 16 yrs	≠ > 5 yrs + fine ≠ > $100,000		In trial court's discretion after making certain findings § 137.22 and 137.23 court may reduce to Class A Misdemeanor	Available.
* PENNSYLVANIA	18-3122 Statutory Rape 2° Felony 18-3123 Involuntary deviant sexual intercourse -- 1° Felony	< 14 yrs < 16 yrs	≠ > 10 yrs 18-106 > 10 yrs	§ 9714 2nd offense is mandatory 5 yrs minimum if prior violent offense.	Discretion.	Probation available. Parole: if sentence is < 30 yrs.
* RHODE ISLAND	11-37-8.1 1° Child molestation sexual assault 11-37-6 3° sexual assault	≤ 14 yrs 14 - 16 yrs	≠ < 20 yrs to life ≤ 5 yrs	Yes. Yes.	≠ < 2 times min. sentence, if subsequent offense as minimum	
* SOUTH CAROLINA	16-3-655 Criminal sexual conduct with minors in 2°	11 - 14 yrs	≠ > 20 yrs	1/4 sentence = mandatory	In trial court's discretion.	Probation available. Parole: if sentenced to ≠ > 30 yrs, eligible after 1/3. If 30 yrs to life, eligible after 10 yrs.
SOUTH DAKOTA	22-22-1 Rape 2° Class 3 Felony	10 - 16 yrs	≠ > 15 yrs, + $15,000 fine	2nd offense -- 3/8 of sentence & increases to ≠ > 25 yrs. (becomes Class 2 Felony)	In trial court's discretion.	If 2nd offense, eligible after deducting good time minus 3/8 time remaining.

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY SENTENCING / REPEAT OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
TENNESSEE	39-2-605 Statutory Rape Felony	13 - 18 yrs	≠ > 5 yrs			
* TEXAS	22.011 Sexual assult 2° Felony	< 17 yrs	≠ < 2 yrs nor > 20 yrs + fine ≠ > $10,000	Repeat offender = 1° Felony Life or any term ≠ > 99 yrs or < 5 yrs.		
* UTAH	76-5-401 Unlawful sexual intercourse 3° Felony 76-5-404 Forcible sexual abuse 2° Felony	< 16 yrs < 14 yrs (but not amounting to rape)	≠ > 5 yrs + fine of ≠ > $5,000	76-3-408 Life imprisonment possible. Enhanced sentence for repeat 2° felony offenders -- 3 yrs more.	Consecutive sentences may be imposed in trial court's discretion.	Probation available. Parole if NO prior.
* VERMONT	§ 3252 Sexual assault	< 16 yrs	≠ > 20 yrs or fine ≠ > $10,000 or both.	Yes.	In trial court's discretion.	Eligible after minimum term served. Probation available.
VIRGINIA	18-2-63 Carnal knowledge of child between 13 &15. Class 4 Felony Consent = defense only if Defendant is a minor also.	13 - 15 yrs	≠ < 2 yrs nor > 10 yrs		May get consecutive in trial court's discretion.	Sentence may be suspended or modified during term of imprisonment Probation available only if first offense.
VIRGIN ISLANDS	§ 1702 Rape in 2°	13 - 16 yrs	≠ > 10 yrs			
WEST VIRGINIA	61-8B-2 (lack of consent) 61-8B-5 (sexual assault in 3°) Felony	< 16 yrs	≠ > 1 yr nor > 5 yrs + fine ≠ > $10,000	If subsequent offense, add 5 yrs to max. sentence. If 3rd conviction, gets life imprisonment.	Consecutive, unless court orders concurrent. 61-11-21	

STATE	STATUTE NUMBER	STATUTORY RAPE AGE RANGE	SENTENCING RANGE	MANDATORY / REPEAT SENTENCING / OFFENDER	CONSECUTIVE SENTENCING AVAILABLE	PROBATION/PAROLE ELIGIBLE
WASHINGTON	9A.44.090 (prior to 7-1-88) Statutory Rape in 3° 9A.44.079 (eff. 7-1-88) Rape of child in 3° (both Class C Felonies)	14 - 16 yrs 14 - 16 yrs	6 mo. - 6 yrs, 2 mo.	Enhanced per point system in offender scoring process.	If certain conditions apply.	
* WISCONSIN	940.225 Sexual assault in 2° Class C Felony	12 - 18 yrs (prior to 7-1-89) 12 - 16 yrs (eff. 7-1-89) Person < 15 is unable, as matter of law, to consent.	≠ > 10 yrs or fine ≠> $10,000 or both. 939.50	If subsequent offense, may increase sentence on 2nd offense by up to 6 yrs. 939.62		Probation available.
WYOMING	6-2-304 Sexual assault in 3° 14-3-105 Immoral or indecent acts	< 16 yrs < 19 yrs	≠ > 5 yrs, if first offense ≠ > 10 yrs or fine or both	≠ > 10 yrs, if subsequent offense.		Probation available.

LEGEND

<	less than	max	maximum
>	more than	min	minimum
≠ >	not more than	sent	sentence
≠ <	not less than	eff	effective
≠	not	conv	conviction
=	is or equal to		

* States having potential sentencing parameters consistent with those in Arizona.

Supreme Court, U.S.
FILED
OCT 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-473

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1990

STATE OF ARIZONA

Petitioner,

vs.

JOSEPH BARTLETT, JR.

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

DAVID P. FLANNIGAN
Attorney at Law, P.C.
606 Highway 92
P.O. Box 4340
Bisbee, Arizona 85603
Tel: (602) 432-5791

Attorney for Respondent

NO. 90-473

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1990

STATE OF ARIZONA

Petitioner,

vs.

JOSEPH BARTLETT, JR.

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

DAVID P. FLANNIGAN
Attorney at Law, P.C.
606 Highway 92
P.O. Box 4340
Bisbee, Arizona 85603
Tel: (602) 432-5791

Attorney for Respondent

QUESTIONS PRESENTED FOR REVIEW

A. Should this Court on the basis of the doctrine of *stare decisis* refuse to abandon its holding in *Solem v. Helm*, 463 U.S. 277 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), for the reason that there are no subsequent conflicting precedents, and there are no changes in conditions which justify overruling it and the case established a workable rule?

B. Did the Arizona Supreme Court correctly apply the federal constitutional doctrine set forth in *Solem v. Helm*, by finding that Joseph Bartlett Jr.'s 40 year sentence, without the possibility of parole, pardon or other early release, for engaging in "nonviolent, nonincestuous, heterosexual and consensual sexual intercourse with two willing post-pubescent teenagers," constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

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STATEMENT OF THE CASE

In January, 1987, Joseph Bartlett, Jr. (Joe), then 23 years of age, was living in a trailer court near the local high school in Sierra Vista, Arizona. He and his wife Nancy had separated some months before and Joe was living in the trailer, sometimes alone or with his mother and sometimes with Nancy and the three children. The family had moved to Sierra Vista from Clovis, California, after Joe's step-father committed suicide in 1985. Although Joe was unemployed, he had worked at various jobs in Sierra Vista and had worked as a security guard for a couple of years in California. Joe had no felony convictions of any sort and had never experimented with drugs.

In the latter part of 1986, Joseph Bartlett met Lisa Drennon, age 14, Heather Tudor, age 14, and Rebecca Griffin, age 15, who lived or regularly visited in the same trailer court. Lisa and Heather, who were best friends, were not virgins when they met Joe, and, in fact, were quite experienced sexually. Joe began to date Heather, who ran away from home and moved in with Joe's mother in Fall, 1986. Joe and Heather had sexual relations when she was 14 years, 10 months old. Heather testified that her decision to run away had nothing to do with Joe, and that she stayed with Joe's mother because Joe's sister had been one of her friends. Heather later moved back home.

In January 1987, Lisa Drennon lied to her mother, Ms. Michelle Drennon, that Joe had forcibly raped her. On Saturday evening, January 10, 1987, a Sierra Vista Police Department officer was dispatched to the mobile home of Ms. Drennon, who had discharged a rifle while loading it. Ms. Drennon explained that she had loaded her rifle so that she could shoot her neighbor, Joe Bartlett. She further explained that her daughter, Lisa, complained that she had been walking to school one day in early December, 1986, when Joe had invited her inside his trailer, offering her a ride to school. Ms. Drennon claimed that once Lisa was inside Joe's home, he dragged her into the bedroom, stripped and raped her. Lisa also maintained to the officer that she had fought vigorously to prevent the rape, but afterwards, accepted a ride from Joe to school.

Ms. Drennon's rifle was confiscated, and she filed a Complaint with the Sierra Vista Police Department the following Monday morning, January 12, 1987. At that time, Sierra Vista Police Department Detective Pearce interviewed Ms. Drennon and scheduled an interview for Lisa later that afternoon. At her interview, Lisa maintained her previous rape story to Detective Pearce, and also told him that she knew of two other female adolescents from the high school, who had had sexual intercourse with Joe. Police officers also

went to the mobile home park and spoke with neighbors to confirm that Joe in fact resided there.

Joe learned of the police inquiries from his neighbors, and, that afternoon, drove to the police station to find out what the problem was. By that time, the police had concluded their interview with Lisa and her mother, and, Detective Pearce had all the relevant information as to Lisa's accusation. Meeting Joe in the public lobby of the police station, Detective Pearce asked him to step back into his office.

Once inside the detective's office, Joe again asked why the police had been looking for him. Joe was never advised of his Miranda rights; instead, Detective Pearce simply related that Lisa Drennon had reported that she had been raped by Joe. Joe Bartlett's surprised response was that he had not raped Lisa.

Although he denied any involvement with Lisa at first, Joe later explained that Lisa had invited herself to his house one evening and began "teasing" him. He further recounted that Lisa had begun by massaging the front of his pants, and then moved her hands to the inside of his pants. At first Joe resisted, telling her to "knock it off" and go home. Lisa did go home; however, she returned later that night. She let herself in, sat on Joe's lap and kissed him. He went into his bedroom and she followed. The two disrobed, copulated, and then she kissed him goodnight.

At some point during the questioning, Detective Pearce decided to tape record the interrogation. On tape, he led Joe through the fact that he had just stated he and Lisa had consensual sex and further led Joe into admitting that Pearce had told him he was not under arrest and could leave.

Detective Pearce inquired of Joe as to Lisa's reputation with other men. Joe advised that Lisa had openly discussed her sexual exploits with other men, and thereupon Pearce requested Joe's help in locating Lisa's other lovers, assuring Joe that they would not "be in any trouble".

Pearce then asked Joe about Heather Tudor, whom Lisa had named as having had sexual intercourse with Joe. As indicated above, Heather had once been Joe's girlfriend. She also was once Lisa's best friend. Joe readily admitted that Heather had been his girlfriend, that they had dated several months, and had gone to movies, dinner and the like. Sometime during their courtship, Heather stated to Joe that her mother had given her advise to the effect that, if they were going to have sexual relations, she should use some form of birth control. Joe admitted that the two thereafter had consensual sexual intercourse.

Toward the conclusion of the tape recorded interview, Detective Pearce showed Joe the statutory language classifying as a felony the engaging in sexual relations with minors as is set forth in A.R.S. §13-1405. Joe indicated that he had

learned that having sex with a minor was illegal while at security officer school in California (where having consensual sexual relations with a 14 year old is a misdemeanor). Detective Pearce managed to lose the tape recording of his interview with Joe, but only after he had prepared an "edited transcription" thereof, which he presented and was admitted at trial.

Joe returned home, and, about a week later, on January 23, 1987, the State presented a three count indictment to the Cochise County Grand Jury alleging that Joe committed sexual conduct: In late November, 1986, with Rebecca Griffin, age 15 (a class six felony); in early December, 1986, with Lisa Drennon, age 14 (a class 2 felony); and two weeks before Christmas, 1986, with Heather Tudor, age 14 (a class 2 felony). The State alleged that the crimes were in violation of A.R.S. §13-1405, which is the substantive criminal law statute, and of A.R.S §13-604.01, which provides for enhanced punishment for certain crimes against children, including sexual conduct with minors under the age of 15 years. If the sexual conduct is with a 15 year old, or older, then the general punishment statute A.R.S. §13-701 applies. Copies of these statutes are annexed hereto as Appendices "A", "B" and "C", respectively. Under this combination, at the time of the indictment, in case of a conviction, Joe would be looking at probation or a minimum term of .75 years, a presumptive term

of 1.5 years and a maximum term of 1.87 years for having had sexual relations with Rebecca Griffin. At the same time, he was looking at a minimum term of 15 years, a presumptive term of 20 years and a maximum term of 25 years, without the possibility of probation or parole until all of the sentence was served, if convicted of having had sexual conduct with either Heather Tudor or Lisa Drennon.

It was established during the course of later police investigations that Lisa had outright lied about being forcibly raped by Joe, and Lisa herself subsequently admitted it. The evidence ultimately adduced at trial showed that Joe's version of the facts was truthful, and that the one act of intercourse enjoyed between them was fully consensual.

During the pretrial proceedings, the State offered Joe a plea agreement covering all three alleged offenses and stipulating that he serve five years with the Arizona Department of Corrections. Joe rejected the plea agreement on June 19, 1987. Joe's court appointed attorney moved to withdraw, stating as the basis therefor the rejection of the plea agreement. Substitute counsel was then appointed.

The State, apparently in response to Joe's rejection of the plea, moved on July 2, 1987 to invoke the enhanced sentencing provisions of A.R.S. §13-604(H), a copy of which is annexed as Appendix "D". Under this sentencing scheme, and its counterpart, A.R.S. §13-604.01(H), included in Appendix

"B", the convictions and the associated sentences must be staked one on top of the other, to run consecutively, with the latter conviction being further enhanced. Thus, a conviction for sexual conduct with Lisa Drennon and Heather Tudor would carry a minimum term of 40 years, a presumptive term of 50 years, and a maximum term of 60 years, with no possibility of probation or parole, until all the sentence was served.[1] Presented with these numbers, and the reality that consent was not a defense, Joe returned to California and was tried *in absentia* on August 11, 1987.

Following the trial, Joe was convicted of having had sexual relations with Heather Tudor and Lisa Drennon, both of whom testified that their acts were completely consensual. He was acquitted of having engaged in sexual conduct with Rebecca Griffin. At sentencing, the trial court was required to sentence Joe to a minimum mandatory sentence of 40 years without the possibility of early release until every day of the 40 years was served. Nevertheless, the following stark facts loomed large in the mind of the sentencing judge:

1. Joe was born April 1, 1963; he was 23 years, 8 months old when the criminal acts occurred. Upon imposition of the minimum mandatory term, Joe, if

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[1] At oral argument before the Arizona Supreme Court, it was noted that the statutorily permissible stacking of felony counts within one indictment, so that one count serves as a prior conviction to another count, for the purpose of sentence enhancement, is provided for only in the States of Arizona and Florida.

still alive, would be released on October 24, 2027, at the age of 64 1/2 years of age.

2. Lisa Drennon was born June 6, 1972; she was approximately 14 years, 6 months old at the time of the criminal act. Had she been six months older, Joe would have been sentenced under A.R.S. §13-701(B)(5), §13-702, *et seq.*, to probation or imprisonment for not less than nine months, nor more than 22 1/2 months.

3. Heather Tudor was born February 22, 1972; she was approximately 14 years 10 months at the time of the criminal act. Had she been two months older, Joe would have been sentenced under A.R.S. §13-701(B)(5), §13-702, *et seq.*, to probation or imprisonment for not less than nine months, nor more than 22 1/12 months.

At sentencing on January 4, 1988, the Judge regretfully applied the minimum sentence of 40 years and made the following comments:

> "My function, as I view it, is not to second guess the legislature in regard to sentencing, but to follow the law. I took an oath to do that. The law is very severe. The law is more severe than -- or the punishment is very severe. The punishment is more severe than in many other types of cases that are very serious offenses. But it is not my function to second guess what the wisdom of the sentence is.

> "If in fact the sentence is too severe, I think that's for the Appellate Court to review. So I really have nothing else to say in regard to the sentencing. I'm going to impose the mitigated term, because I think that it is plenty severe in this case."

On appeal to the Court of Appeals, Mr. Bartlett challenged both the conviction, because of the failure of the trial court to suppress his allegedly involuntary statements to Detective Pearce, and the sentence, as being violative of the State and Federal constitutional proscriptions against cruel and unusual punishment. The Court of Appeals affirmed, and the Arizona Supreme Court granted a Petition for Review of the sentence only, requesting a *Solem v. Helm* proportionality analysis. The Arizona Supreme Court held that Joe Bartlett's minimum mandatory sentence of every day of 40 years, under A.R.S. §13-604.01 was so disproportionately severe that it violated the federal constitutional proscription against cruel and unusual punishment as was expanded upon by this court in *Solem v. Helm, supra.*

Accordingly, the Arizona Supreme Court reversed and remanded the matter to the trial court for resentencing. *State v. Bartlett,* 792 P.2d 693 (Ariz. 1990). The State Attorney General's Office filed a Motion to Stay the issuance of the mandate, because it intended to file a Petition for Writ of Certiorari with this Court. Counsel for Mr. Bartlett successfully opposed the motion, arguing that the United

States Supreme Court perhaps would be interested in knowing what sentence was ultimately imposed by the trial court.

At resentencing, Joe was facing a sentencing range of 7 to 35 years on two stacked class two felonies, pursuant to A.R.S. §§ 13-604, 13-701 and 13-702. Specifically, Joe was facing a minimum of 5.25 years on the first count and 7 years on the second count, to run concurrently, wherein he must serve 2/3 of the sentence before becoming parole eligible. He was facing a maximum of 35 years, if an aggravated term of 14 and 21 years for the first and second counts, respectively, were applied on each conviction, to be served consecutively. The presumptive terms for each count were 7 and 10.5 years, respectively. In this regard, Arizona law provides that if the facts alleged in the separate counts involve separate acts, the sentences should run consecutively unless the sentencing court expressly directs otherwise. Arizona Rules of Criminal Procedure, Rule 26.13.

At resentencing, the Court was presented with certain facts that were unknown at the first sentencing. Specifically, the State stipulated that certain documentation be admitted into evidence for the purpose of resentencing, showing that one month after Joe Bartlett was tried, two of the same "victims" mentioned in the Indictment, Heather Tudor and Rebecca Griffin, sought the conviction of another man, Rocco Griffin, for the same offense. Heather had happily

bragged that she was Mr. Griffin's girlfriend and that the two had enjoyed sexual intercourse together. Heather Tudor explained to her friends, in graphic detail, the couple's lovemaking, initiated by her voluntary offer of oral sex and Mr. Griffin's acceptance of the offer. This was just one month after she testified in court about her consensual sexual relations with Joe Bartlett when she was his girlfriend. Although a criminal complaint had been filed on these charges against Mr. Rocco Griffin, who was arrested and incarcerated, the Cochise County Attorney's office elected not to take that matter to the Grand Jury.

The reason that the *State v. Griffin* documentation was introduced into evidence upon resentencing was its relevance to the harm to or helplessness of the "victims" as bearing upon aggravation or mitigation of the presumptive terms. It was also relevant to show that the girls in this case were not inexperienced innocents who did not fully appreciate the meaning of sexual intercourse and were thus incapable of giving meaningful consent.

At resentencing on August 27, 1990, Mr. Bartlett and counsel presented the Court with a brief synopsis of Joe's life in prison since January 4, 1987 as follows:

> Mr. Flannigan: . . . ". . . treated as a child molester. . . he's on the absolutely lowest rung of the prison society. He has personally suffered immensely. He's been beaten, sexually raped, abused, victimized, threatened. Those are his day

> to day experience[s]. He has suffered, in fact, a mental breakdown, has had to see a psychiatrist. Compromised himself in order to survive this kind of situation. It's an awful, awful world that he has been introduced into.
>
> "If it could be said according to the evidence that he at all sinned against these girls, he's certainly been sinned against far more than that, and he has suffered immensely. If the purpose of punishment is to make him suffer, his suffering at this point far exceeds any harm to the victims.
>
> Mr. Bartlett: . . . "I agree with what Mr. Flannigan says, because it has been hard in prison, really hard. I want this Court to know that I have no resentment towards anyone. I have found my peace with God and with myself.
>
> "My only wish is to finally go home, to be with my family, get a good, honest job and be a productive member of society and be the best father I can to my kids. I ask that this Court have mercy on me.

Following those comments, and sans any argument by the State for the imposition of anything more than the mitigated term, the sentencing judge imposed the minimum term, of five and seven years, to run concurrently, with credit for time served and stated as follows:

> "The Court finds that the mitigating factor here that would require the mitigated term for sentencing would be that the Defendant had no prior record, and I just, quite frankly, feel that the mitigated term is sufficient punishment for the facts of this case.

As indicated, Mr. Bartlett will now be required to serve at least 2/3 of the seven years imposed, which closely approaches the five years offered by the State's plea agreement as an appropriate sentence several years before. Having

served nearly three years of his sentence, Mr. Bartlett will become eligible for parole in about two years.

SUMMARY OF THE ARGUMENT

A consideration of the time honored principle of *stare decisis* compels the conclusion that *Solem v. Helm* should not be reversed. It has neither been rendered irrelevant by charged circumstances or subsequent authority, nor is it unworkable. To overrule precedent, one of these three special justifications need be present.

In this case, because of the mandatory sentencing scheme of A.R.S. §13-604.01, 40 years or the rest of Joseph Bartlett's life was at stake and he did not have the possibility of a lesser sentence, pardon, parole or other early release for having had consensual sexual relations with two 14 year old sexually mature girls.

Under the circumstances, the Arizona Supreme Court correctly applied a *Solem v. Helm* analysis to the gravity of the offense *vis-a-vis* the harshness of the penalty, the sentences imposed on other more serious crimes in Arizona, and the sentences imposed for the same crime in other states as a predicate to holding that, in this limited case, the application of that mandatory sentencing statute to the facts constituted cruel and unusual punishment. Accordingly, the Arizona Supreme Court correctly reversed the sentence and remanded the case to the trial court for resentencing.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

FIRST ARGUMENT:

A. ON THE BASIS OF THE DOCTRINE OF *STARE DECISIS*, THIS COURT SHOULD REFUSE TO ABANDON *SOLEM v.HELM* FOR THE REASONS THAT THERE ARE NO LATER CONFLICTING PRECEDENTS, THERE ARE NO CHANGES IN CIRCUMSTANCES WHICH JUSTIFY OVERRULING IT, AND IT IS A WORKABLE RULE.

The State of Arizona is asking that this Court overrule its precedent announced in *Solem v. Helm*, 103 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 277 (1983), a decision the State says presents an "unworkable rule" and is in conflict with *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed. 2d 382 (1980). The State does not present a more workable alternative, nor does it advocate a new path to follow. The Court, in this instance, is asked to construct a new path rather than follow the lighted way of its recent precedent. Respondent maintains that, more important than "revisiting" the decision in *Solem v. Helm, supra.*, is the need to accord to the doctrine of *stare decisis* the careful reflection and respect to which it is entitled. To this end, the Respondent questions the wisdom of quickly turning the Court's back on recent precedent and ignoring the doctrine of *stare decisis*, as the State of Arizona has urged. Such would be the judicial equivalent of strip mining, a process that inherently erodes

the stature of this Court's jurisprudence and thereby, the judiciary as a whole.

Respondent's argument herein proceeds in two parts: Part I discusses the doctrine of *stare decisis* and its functional purposes; and, Part II examines the standards that have been set by this Court for overruling precedent, and an argument for not overruling *Solem v. Helm* because it does not meet those standards for abandoning the doctrine of *stare decisis*.

PART I. *STARE DECISIS* AND ITS PURPOSE.

The Latin term *stare decisis et non quieta movere*, meaning to stand by the decisions and not to disturb settled points, is the name given to the Anglo-American common-law doctrine which states that the holding of previously decided cases should be followed. *Black's Law Dictionary*, Fifth Edition, p. 1261.

The importance of *stare decisis* in Anglo-American jurisprudence is undisputed. The doctrine ensures stability and maintains the rule of law, a rule that is premised on the belief that we are a nation of laws and not men. As such it plays a critical role in the coherent development of the common law.

A. The Doctrine of *Stare Decisis* Promotes Certainty In The Law.

The doctrine of *stare decisis* is essential because of its many useful purposes. Among these purposes is that its consistent application assures the legal system a degree of certainty. Judicial awareness of the need for certainty accounts for the presence of the doctrine of precedent within a legal system, inasmuch as order, regularity, and stability are essential attributes of a legal system. As Lord Eldon, quoting from Lord Kenyon, said nearly two centuries ago: "It is better that the law should be certain than that every judge would speculate upon improvements in it." *Sheddon v. Goodrich*, 8 Ves. 497, 32 Eng.Rpt. 441, 447 (1803).

B. The Doctrine of *Stare Decisis* Is Founded On Equitable Principles.

Another justification for the doctrine of *stare decisis* is that a universal sense of justice urges that all men be treated alike in like circumstances. Inequitable judicial treatment is a primary source of grievance against a judicial system. To consistently follow previous case precedent creates the uniformity and equality necessary to legal order, and avoids the public appearance of injustice. To leave that consistency, by disturbing precedent, is to disturb the equality, uniformity, regularity, similarity, and symmetry of the law.

C. The Doctrine of *Stare Decisis* Promotes Judicial Efficiency.

Yet another purpose of the doctrine of *stare decisis* is that the reliance on precedent promotes the efficient administration of justice.

If precedent could not be relied upon as the rule of law, the administration of justice would become difficult, tedious, and near impossible. If a justice, or judge on any level, did not have the benefit of reliable precedent, then not only must he or she elucidate, ponder, and evaluate all possible rules of law which might be formulated for every case, but he or she must also examine all the reasons that might be advanced for instituting any one of these rules rather than any other. In short, the task of the judge would become interminable. The number of cases subject to proper litigation would be severely reduced. The function of the judiciary in society would be rendered infinitely less useful. On the basis of his own experience as Chief Justice of the New York Court of Appeals, Mr. Justice Cardozo observed that:

> "...the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. Perhaps the constitution of my own court has tended to accentuate this belief. We have had ten judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to

stand by the errors of our brethren of the week before, whether we relish them or not." B. Cardozo, *The Nature of the Judicial Process*, pp. 149-150., partially quoted in Mr. Justice Steven's concurring opinion in *Runyon v. McCrary*, 96 S.Ct. 2586, 2604, 427 U.S. 160, 190-191, 40 L.Ed.2d 415 (1976).

D. Judicial Restraint Is a Recognized Goal of The Doctrine of *Stare Decisis*.

Judicial restraint has also been recognized as a basis for the doctrine of *stare decisis*. Judicial restraint establishes affirmative norms of judicial behavior, and one is reminded of Lord Coke's statement that "no man out of his own private reason ought to be wiser than the law, which is the perfection of reason." The doctrine furnishes a desirable restriction upon the way in which an individual judge, or coalition of judges decides a particular case. If one particular justice had strong feeling regarding the interpretation of the Constitution, his individual conceptions would not serve to alter the body of constitutional law if he were bound by the doctrine of *stare decisis* to respect past precedent.

E. Abusing the Doctrine of *Stare Decisis* Endangers the Structure of Judicial Philosophy.

If restraint in this manner were not given a meaningful significance in deciding cases, the appointment of justices would become little more than political appointments secured by their implied promise of obedience to executive order.

An example of the danger present can be demonstrated by examining the Court's past. In the case of *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-11 (1932), Mr. Justice Brandeis, in his dissent, provided a comprehensive list of prior decisions that overruled or qualified earlier constitutional precedent. These twenty-eight cases spanned a period of roughly 140 years of the Court's history, taking an average of five years to overrule or substantially qualify a single case.

After *Burnet*, the Court took only twelve additional years to outright overrule twenty-one constitutional decisions, an average rate of 1.75 cases per year. Between the years 1944-1979, the Court reversed 107 constitutional decisions, the rate of reversals having grown to more than three a year.

The rate and kind of reversals, obviously, were generated by the political currents of the day. For instance, during the last ten years of the Warren Court, 23 constitutional cases were overruled. During the first ten years of the Burger Court, the Court overruled 21 constitutional decisions. The fabric of the law was unwoven by one Court and fashioned to its liking, only, in turn to have the politically expedient process repeated -- a process unlikely to instill stability and public confidence in the law.

It must be believed, therefore, that political convictions and party beliefs cannot fashion legal reasoning.

Neither can the considered decisions of this Court, which contribute to the wealth of common law, be a proper subject of Senate inquisition, via the confirmation process of a Supreme Court appointee. Only by closely following the doctrine of *stare decisis*, via judicial restraint, can the judiciary exist separate and apart from the fashionable political philosophies of any particular day.

The Weimar Constitution is an example of this point. As a threshold matter, it is first acknowledged that the example is extreme, and has no real comparative value with this Court's ability to function independently. However, the historical lesson of exercising judicial restraint regardless of popular political conviction should not be lost through discarding the example as unlikely to recur. History is said to repeat itself, and often does so when the lessons of the past are ignored. Viewed as a legal document, the Weimar Constitution was an extraordinary piece of legal scholarship that demanded the respect of the greatest legal minds of the day. However, it quickly lost its meaning, and thereafter its force, when the judiciary relinquished its ability to fashion legal reasoning upon judicial review of accepted legal theories and precedents of the past, instead substituting the popular changing political convictions of pre-World War II Germany. The humane intention of the Weimar Constitution had no voice of its own; that voice had been severed, and the

voice of the popular opinion had been substituted. The sad consequences are known. H. W. Koch, *A Constitutional History of Germany In the Nineteenth and Twentieth Centuries*, Longman Publishing, London 1987.

The doctrine of *stare decisis* is the only method by which we can firmly believe that the carefully considered opinions of this Court have a past, and, consequently a future. The warning of Mr. Justice Roberts that overruling decisions will diminish the authority of the Supreme Court should be heeded:

> "[The frequent overruling of decisions would] ... tend to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1942).

When the interwoven chain of obligation to the past is breached in this fashion, law ceases to exist as we know it, for law was intended to revolve around the concept of respecting the precedent set forth by common law. In expressing his belief that adherence to precedent should predominate over the merits of a particular case, Mr. Justice Brandeis wrote:

> "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co., supra.*, at 406.

PART II. STANDARDS FOR OVERRULING PRECEDENT.

There is no federal statutory requirement of *stare decisis*. Sections 1254, 1257, and Title 28 of the United States Code, which concern review by the Supreme Court on appeal or writ of certiorari, imply only that the Supreme Court may reverse the lower court's decisions or remand with instructions. 28 U.S.C. at 1254, 28 U.S.C. at 1257, as amended. Moreover, it is noteworthy that Rule 10, Rule of Practice of the United States Supreme Court (1990), does not list the request to overrule its own precedent as one of the considerations for granting a writ of certiorari.

In overruling precedent, Mr. Justice Stevens has pointed out that the question whether to overrule is not simply answered by demonstrating that the case was erroneously decided and that the Court has the power to correct its past mistakes. The doctrine of *stare decisis* requires a separate examination. Among the questions to be considered are: the possible significance of intervening events; the possible impact on settled expectations; and the risk of undermining public confidence in the stability of our basic rules of law. Stevens, *The Life-Span of a Judge-Made Rule*, 58 N.Y.U. L.R. 1 (1983).

In reviewing the constitutional decisions in which this Court has reversed itself, it is apparent that all but a handful have been based upon one of three justifications.

First, the Court will overrule when a precedent has been so eroded by changes in the law that it no longer has an acceptable legal basis. It may be that there exists a group of subsequent opinions issued that, taken together, operate to hollow out or directly conflict with the premise of the underlying challenged case. See, e.g., *Puerto Rico v. Brandstad*, 483 U.S. 219 (1987) (overruling *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861)).

Second, the Court will overrule when the conditions upon the which the first decision was premised have changed. See, *e.g.*, *The Propeller Genesee v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) (overruling *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825)).

Finally, certain constitutional cases have been overruled when the majority views the rules set forth in the underlying precedent as being "unworkable". See, *e.g.*, *Garcia v. San Antonio Metropolitan Transit Authority*, 465 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)). See also *Mapp v. Ohio*, 367 U.S. 643, 651-55 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949)).

The overruling of *Solem v. Helm, supra.*, would involve a breach of the doctrine of *stare decisis*. To do so necessitates that a new majority can justify an overruling on one of three aforementioned commonly accepted grounds. A

discussion of the relationship of each of these independent grounds as it relates to *Solem v. Helm* follows.

A. The Subsequent Conflicting Precedent Standard.

Since the time that *Solem v. Helm* was announced, no decision or series of decisions by this Court has challenged the underlying premise of Mr. Justice Powell's reasoning. There is no subsequent conflicting precedent which justifies the abandonment of *Solem v. Helm*. The decision of *Solem v. Helm* remains controlling in cases presenting narrow factual circumstances.

The State of Arizona argues, as did the dissent in *Solem v. Helm*, that *Solem v. Helm* conflicts with this Court's previous precedent in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). Since the case precedent conflict is said to have occurred before *Solem v. Helm* and not since, members of this Court are essentially being asked to substitute their opinions for the considered opinions of recently retired Mr. Justice Brennen and Mr. Justice Stevens.

Whether *Rummel* was in conflict with the majority's decision in *Solem v. Helm* is an issue that has been decided. It is simply the law-of-the-case. It was decided that *Rummel* was good law, and was to be distinguished from *Solem v. Helm*. The distinguishing factors are rather easy to follow. In *Rummel* the defendant had the possibility of being released on parole by earning "good time credit", to be applied to the

reduction of time that he would be obligated to serve. The defendant in *Solem v. Helm* did not have that possibility, and could not obtain "good time credit". He would be eligible for parole only if he obtained a rarely extended grant of executive clemency. He applied for clemency and the governor of South Dakota denied same. It was noted by the *Solem v. Helm* majority, at 301, that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." (*Rummel, supra* at 279.) The majority thus concluded that the South Dakota commutation system was fundamentally different from the parole system in Texas.

The distinction is clear. It lies within the definition of what constitutes a "mandatory sentence". If the sentence is subject to meaningful early release provisions, it is not, in reality, a mandatory sentence inasmuch as there is not an immutable term of years that the defendant must serve. *Solem v. Helm* is applicable only if the sentence is unquestionably a mandatory sentence in the strictest sense.

In the case before the bar, the defendant was not eligible for parole or any other type of early release, as in *Estelle*. The defendant was not even eligible for the remote possibility of executive clemency as in *Solem v. Helm*. *Solem*

v. Helm is unmistakably the controlling authority in this case.

The minority in *Solem v. Helm* maintained, as presently does in the State of Arizona, that the decision reached in *Solem v. Helm* was in direct conflict with the holding of *Rummel v. Estelle*. The majority, however, decided that the holdings were actually consistent one with the other.

In *Rummel* the Court stated that:

> " . . . one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." 445 U.S., at 274, 100 S.Ct., at 1139 (emphasis added).

As noted by the majority in *Solem v. Helm, supra,* 463 U.S. at 290, the Supreme Court had not adopted that argument as a legal standard, based on past precedent, but merely recognized that the argument was possible. Moreover, the Court held that the constitutional principle of proportionality had been a matter of *stare decisis* for almost a century preceding their ruling. Cf. *O'Neil v. Vermont*, 144 U.S. 323 (1894). It was explicitly held in a landmark non-capital punishment case, *Weems v. United States*, 217 U.S. 349 (1910), that the sentence of 15-years imprisonment at hard labor, for falsifying a public document, was cruel and unusual

punishment. Mr. Justice McKenna delivered the opinion of the Court and noted:

> "...it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Id.* at 367.

Further, *Rummel v. Estelle* was consistent with the proportionality theory adopted by the majority in *Solem v. Helm* and *Weems v. United States, supra.* The *Rummel* Court recognized that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. *Rummel v. Estelle, supra,* 445 U.S., at 274, n. 11. This view was consolidated when the Court explained in *Hutto v. Davis, supra,* 454 U.S., at 374, and n. 3, that *Rummel* should not be read to foreclose proportionality review of sentences of imprisonment. The theory of judicial proportionality review of imprisonment was not vacated in *Rummel,* a conclusion that was expressly held in *Hutto v. Davis. Solem v. Helm* simply held that in *Rummel* because the defendant was eligible for a reasonably early parole, his uncertain length of sentence was not one that was appropriate for a proportionality review. It is submitted that had the Respondent herein been eligible for early parole he would have, in this regard, shared a narrow yet similar factual basis with the defendant in *Rummel.* This case would then have been controlled by *Rummel,* and, like *Rummel,* Respondent's sentence would not be an appropriate sentence for proportionality review.

However, like *Solem v. Helm*, the present case is expressly distinguishable from *Rummel*, and both sentences were proper for proportionality review.

Arguendo, provided that the Court were persuaded that *Solem v. Helm* and *Rummel v. Estelle* were conflicting opinions and irreconcilable, the standard for overruling *Solem v. Helm*, on the basis of conflicting precedents is not whether the majority was mistaken, but whether it was "egregiously incorrect." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 304 (1985); *Florida Department of Health and Rehabilitative Service v. Florida Nursing Home Association*, 450 U.S. 147, 153 (1981); *accord. Monroe v. Pape*, 365 U.S. 167, 202 (1961).

Respondent maintains that it is improper to do so because *Estelle* was previous rather than subsequent to *Solem v. Helm*, and therefore can not be considered a conflicting case precedent. To hold otherwise would be to overrule the express holdings in *Hutto v. Davis, supra.*, *Weems v. United States, supra.*, and *O'Neil v. Vermont, supra.* that it is possible, in rare situations, for certain sentences of imprisonment to be imposed which are so disproportionate to the crime committed that they are unconstitutional under the Eighth Amendment, and require remand by the judiciary.

In conclusion, *Solem v. Helm* cannot be overruled on the theory of conflicting precedent.

B. Change in Conditions As Justifying Overruling Precedent.

The Court will overrule when the conditions upon which the first decision was premised have changed. For example, in *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), the Court overruled 26 year old precedent, *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). In the *Steamboat* case, the Court had held that the admiralty jurisdiction of the United States was limited to the traditional English bounds of the "ebb and flow of the tide." See id. at 428. By 1850, however, the United States had spread from the Atlantic Coast well into the interior of the continent, and a vast trade had emerged on the Mississippi, the Great Lakes, and other inland bodies of water. *The Genesee Chief*, 53 U.S. (12 How.) at 456, recognized that the opening of the West, only dimly foreseen by the *Steamboat* Court, changed the issue presented, and that new conditions demanded uniform national regulation.

In the present instance, the conditions upon which *Solem v. Helm* were premised have not changed.

We are not yet in such enlightened times that our legislatures can be given a free and unchecked hand in decreeing punishment for crimes. The possibility exists that the popular demand may prevail in mandating unconstitutional punishment for crimes. However, in just such a case the judiciary must preserve its ability to provide a checks and

balances function on the legislature. It would be a rare circumstance that the judiciary would find that a sentence is constitutionally infirm. However, to the extent that the judiciary denies Eighth Amendment review of a constitutionally infirm sentence and thus resigns its responsibility to provide this protection to the public, it abdicates its position in the checks and balances scheme.

The development of our system of criminal law has demonstrated that justice's ultimate goal is (1) to acquit the innocent, (2) to convict and to punish the guilty, and (3) to demand that the punishment fit the crime. To the extent that our system of justice does so, it is successful and right. To the extent it does not do so, it fails. This Court is charged with the vital role of guarding our system of justice from failing, by giving expression to the conscience of the law, through the Constitution. The decision in *Solem v. Helm* continues to provide the Court the ability to serve the aforesaid third goal of justice via the review of sentences, in properly narrowed circumstances. Its need has not been diminished by time, as in the case of *The Thomas Jefferson Steamship, supra.*

C. Unworkable Precedent.

Certain constitutional cases have been overruled when the majority views the rules set forth in the underlying precedent as being "unworkable". See *e.g., Garcia v. San Antonio*

Metropolitan Transit Authority, supra, (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)). See also *Mapp v. Ohio, supra*, (overruling *Wolf v. Colorado, supra.)*

The Petitioner argues that the rule in *Solem v. Helm* is unworkable because of the number of appellate cases (772) across the country litigated since it was decided. It is the Respondent's position that the figures presented by Petitioner are misleading. Even assuming that *Solem v. Helm* has been utilized to the extent stated by Petitioner, this does not necessarily lead to the conclusion that the decision is unworkable. The utility of the decision is self-evident. Courts in all jurisdictions have cited *Solem v. Helm* as a legal standard to be included in their constitutional common law. The judiciary across the land has given serious weight to this landmark decision.

As stated above, the figure of 772 cases is misleading. At first glance it appears that this represents the proportionality review of 772 challenged sentences which were claimed to be excessive. Actually, this is not so, as this number only represents citations to published and unpublished decisions. A Proportionaliy analysis was not done in each case. Also the figure assumes that the appellate issue of challenging sentences, as being cruel and unusual, is a novel concept in the practice of criminal law, and has been briefed and addressed only by our courts since the announcement of the

holding in *Solem v. Helm*. This, of course, is not the case. *Solem v. Helm* was cited in those cases because it is recent controlling authority on constitutional challenges to imposed sentences, and previous cases cited previous authority.

Further, there are 370 published and 102 unpublished appellate decisions among our 50 states that cite *Solem v. Helm* as controling authority. *Because Solem v. Helm* was announced 7 years, 4 months ago, the annual average number of published State opinions is 1.02 cases per state, per year. Even considering the addition of unpublished decisions, the annual average only rises to 1.3 cases annually per state.

Even considering the greatest annual number, it does not follow that the case load since *Solem v. Helm* has been oppressive to the appellate courts. As demonstrated, the claim that *Solem v. Helm* is unworkable, because it has fulfilled the prophecy of Mr. Chief Justice Burger that " . . . the majority's decision would cause a flood of new appeals to the appellate courts which would administer the *coup de grace* to the courts of appeals as we know them," is an exaggerated claim. The Petitioner's position that this claim as being present-day reality is not valid.

The Petitioner also argues that *Solem v. Helm* should be overruled because the three-prong test utilized therein, in determining whether an imposed sentence is constitutional, is itself unworkable. The three prongs involve:

(1) Looking at the gravity of the offense and the harshness of the penalty;

(2) Comparing the sentences imposed on other criminals in the same jurisdiction; and

(3) Comparing the sentences imposed for the same crimes in other jurisdictions.

In argument, the following examination of each prong is given to demonstrate that they individually, and as a whole, cannot be defined as "unworkable".

1. Prong One: Looking At The Gravity Of The Offense And The Harshness Of The Penalty.

This prong calls for a two-part examination beginning with the harshness of the penalty and in the end reconciling it with the gravity of the offense. It is Respondent's position that, if questioning the harshness of a given punishment and comparing it to the gravity of the offense is itself an unworkable proposition, then the conception of what is just and fair is equally unworkable.

i. The Harshness of the Penalty.

No reasonable person could argue that a 40 year sentence is not harsh, especially when it is clear this sentence cannot be reduced by the possibility of "good time credit", parole, or executive clemency. Judicial review under the Eighth Amendment, pursuant to *Solem v. Helm*, is the only method for obtaining relief from the serving of every day of the imposed sentence.

Given that, one may suppose that the final disposition of this case will be effected upon this Court's consideration and order. This is not true, if the order of this Court is to reinstate the initial sentence. There is a subsequent disposition after this Court puts this matter aside and again turns to address the pressing onslaught of new cases. That disposition is the life and death of the Respondent. Given the hard and violent environment endured by those sent to our penitentiaries, one cannot readily assume that JOSEPH BARTLETT, JR. will emerge from confinement at the age of 64 years. Arriving as a slightly built and gentle young man, he was welcomed with open arms by the hardened criminal population behind our state's prison gates. It is known that one convicted of the crime of child molestation or its equivalent is on the lowest rung of prison society and is generally considered "free game" by both prisoners and guards. The Respondent's mode of life in prison has been one of daily survival. He has been raped and beaten, and his state of deprivation has compelled him to compromise himself in order to live another day. The boy's spirit and body have been crushed.

ii. Gravity of the Offense.

Certainly, no one can doubt the sound justification for statutes defining sexual exploitation of the immature as a criminal act. The rationale is that it is in the public

interest to protect the sexually naive child from physical trauma, as well as emotional and psychological exploitation. No reasonable person would hesitate to condemn abnormal sexual exploitation of an infant child. Societal interests require the protection of children from physical harm. The very thought of an adult male pedophile forcing his penis inside an infant female orifice is revolting, and raises feelings of outrage and anger in the breast of any responsible adult.

The legislative intent behind Arizona's enactment of A.R.S. §13-604.01 is consistent with both popular as well as universal belief in outlawing such taboo conduct. But, in our well-founded enthusiasm to promote this protective goal, sight should not be lost of the crucial object requiring protection -- the pre-pubescent child -- from the most grotesque, perverted, and lurking monster -- the child molester. That criminal commits offenses that every state in the Union condemns as being the gravest of all offenses, when the victim is a pre-pubescent child.

There is, however, an obvious distinction between grown girls who are under the statutory age and a molested child. Intercourse with a girl in her mid to late teens lacks the qualities of abnormality and physical danger that were present when she was a child. Here, the young woman does not experience the extreme duress and domination seen in child-adult relationships. By her mid-teens, she may be eager, willing,

and consensual to a young man's natural desires, and such desires are not beyond her understanding.

It is clear that the element of victimization gradually decreases and finally dies away altogether as the young woman, no longer a mere child, grows older and more sophisticated, sexually mature and biologically ready for coitus. The metamorphosis of a child blossoming into a young woman, now capable of giving and receiving amorous love, was not lost on the greatest poet ever to write, William Shakespeare. In his perhaps most powerful and best known work, *Romeo and Juliet*, the young women was two-weeks shy of her fourteenth birthday at the beginning of the play, while the young man was identified simply as being a young man. William Shakespeare, *The Tragedy of Romeo and Juliet, Washington Square Press*, (Ed. Wright 1959), Act I. Sc. III, Ln. 13-21. If Juilet can be said to have been too young and incapable of understanding the nature of her consent to amorous love, it is submitted that no women since her time has truly reached that understanding.

While the love shared between the fictional characters Romeo and Juliet differed in tragic tenderness from the relationship that the Respondent had with his "victims", an accurate description of that relationship may have been lost in opposing counsel's translation of the actual event as related in her brief. The actors here are of a more common cut, Bartlett is no Romeo, neither young woman is a Juliet,

and neither counsel as articulate as Shakespeare. Regardless, the instructive distinction is that an infant child is not a young woman or grown girl.

A post-pubescent teen has tne ability, often well rehearsed, to recognize sexual advances and to reject them if she wishes. Thus, she has reached a point of maturity at which, realistically, she may give meaningful consent. The ability to give operative consent distinguishes the mature teen from the pre-pubescent child, who has neither the ability nor the natural desire to participate in sexual encounters. As such, the infant/child does not have what is termed to be operative consent. .Without such operative and meaningful consent, the infant/child is in effect raped, just as a grown girl would be if force or threats are used to negate her non-consent. These two offenses justify the extremely harsh penalties imposed on their perpetrators, as intended by the legislature.

It is absurd, however, in our culture to talk of teenage girls of middle and late adolescence as not having knowledge and appreciation of the sexual act. This knowledge is commonly acquired by puberty, and certainly is reinforced if the mature teen gains sexual experience from previous encounters. She well understands the nature of the sexual act. The question is no longer one of rape, but of morality.

With respect to this moral and social context, modern marriage laws sanction mid-teen marriages. Most states allow girls sixteen or over to marry with their parents' consent, and girls under sixteen to marry upon obtaining judicial consent through a court order. Cf. Arizona, A.R.S. §25-102. We thus know by statute that in any given year, some percentage of marriages will involve girls sixteen or younger. Query, how many of them involve pregnant girls under the age of fifteen years? In such cases the class 2 felony of sexual conduct with a minor, and the companion mandatory sentence, is and has been magically wiped out by the marriage ceremony, and one likes to think that the couple will live happily ever after. But what about those cases where the ceremony does not occur? Is it not cruel and unusual to cage the offending young man for life?

It is an inescapable fact that many young people engage in sexual intercourse. In 1976, 6.4% of all sixteen year old girls in the United States had borne at least one child. U.S. National Center of Health Statistics of the United States, Table 1-17 (1978). These numbers tell us that a significant portion of unmarried fourteen to sixteen year old girls have engaged in sexual intercourse resulting in pregnancy. This strongly suggests that a greater number may well have done so, without pregnancy resulting.

While not approving of the sexual permissiveness of our unmarried youth, one can only conclude that this type of "offense" is committed many times between young people without resulting in criminal prosecution. Counsel would venture to state that this type of offense has historically and prehistorically occurred, universally, since exactly as long a time as there have been eager consenting grown girls just below fifteen years of age and boys in their late teens and early twenties. Regardless of stated law, the law of nature dictates that the occurrence is not unique to past and present times, and will, with frequency, occur in the future.

The gravity of the offense in this case is one that borders on misdemeanor status. Had the girls been two and six months <u>older</u>, the defendant would stand convicted of the lowest class felony defined ed, a class 6 felony. On the other hand had the girls been two months and six months <u>old</u>, the defendant would stand convicted of the same offense as he presently stands, and would be punished under the same mandatory sentence.

The gravity of the offense in the latter instance is obvious. The offender would have committed what has been universally defined as the worst kind of offense. The nature of his abominable acts would be universally considered to be extremely grave. Accordingly, a harsh punishment would be warranted.

The gravity of the offense in the first instance is relatively minor. It is simply untrue to say that the gravity of his offense is that of a child molester. The nature of the offense is fornication with a statutorily underage girl. The nature, and hence the gravity, of these two offenses are as different as night and day. In this case, when one compares the gravity of the offense with the severity of the sentence, the only conclusion that a person of reason can come to is that the two are disproportionate.

However, on this ground alone, one would not find relief under *Solem v. Helm* unless it were demonstrable that other persons convicted of more serious or equally serious types of crimes, in his state, had sentences imposed on them which were less severe than his.

2. Prong Two: Comparing the Sentences Imposed on Other Criminals in the Same Jurisdiction.

This prong calls for a comparison of the sentences imposed on other criminals convicted of offenses in the same jurisdiction, and determining whether the questioned sentence is disproportionate to these other sentences. In the extreme, an example may be given in that if one were sentenced to a definite 10 year sentence for shoplifting, the sentence would be disproportionate if armed robbery was punishable with a 3 year sentence. In this instance that latter offense is considered to be a more serious offense, and it would be

fundamentally unfair to set the former offense with a harsher sentence. It is submitted that it would be the most extreme exception in which a legislature would purposely enact a mandatory sentence that ignored this obviously fundamental consideration. It is only remotely possible that the judiciary would called upon to correct a mistake such as this. However, to say that it is remotely possible is not to say that it is impossible. That which is considered remotely possible is, in other words, a rare occurrence, and it is in such rare circumstances that the judiciary would be compelled to involve itself in a manner as prescribed in *Solem v. Helm.*

There are other situations that may occur where the effect of a mandatory punishment statute is not the intended result, a result that does not reach the legislative intent behind the enactment of the underlying statute. Yet, because the statute is mandatory, the unwanted result can not be corrected by the trial judge during imposition of the sentence. Such is the case here.

It is self-evident that the result obtained here did not even remotely reflect what was intended to be addressed by the Arizona Legislature. The minutes of the Arizona Legislature, attached to Petitioner's brief as Appendix D, is unconvincing of the legislative intent being fulfilled in the instant case. It is submitted that no reasonable person believes that the crime that the Respondent committed deserved the mitigated

sentence of 40 years imprisonment. [Counsel's belief is based upon the fact that, because such a punishment has never, in the recorded history of our nation, been imposed for a crime such as this, it is simply not a punishment that a sane person would consider, advocate, or applaud.]

Indeed, every Justice sitting on the Arizona Supreme Court, a Court that is traditionally very conservative, believed the sentence imposed in this case was an unjust result. All these justices, each from differing backgrounds, beliefs, and philosophies, held the mandatory penalty in this case was of a kind that was "....so severe as to shock the conscience of society," and found it cruel and unusual. *State v. Bartlett, supra,* at 692. (Citing with favor *State v. Davis,* 108 Ariz. 335, 337 498 P.2d 202, 204 (1982). It is submitted that the Justices of the Arizona Supreme Court are not so removed from community standards and values that they could be said to be unable to appreciate the conscience of society in Arizona. Any reasonable person, be it a legislator, jurist, carpenter or scientist, would be alarmed at the sentence in this case. The sentence does not fit the crime committed. Unlike the opinions held by others, the judge must act, because he is duty bound, to maintain a relationship between law and morals, between the precepts of jurisprudence and those of reason and good conscience. When the legislature decrees a mandatory sentence of life in prison as a punishment

for assassination, rape, or arson of an occupied structure, the judiciary should and does carry out the will of the legislature and imposes that sentence on the criminal convicted of the respective offense. However, when the same harsh mandatory sentence is, either by design or unintentionally, applicable to a person who is guilty of disorderly conduct, fornication, or vandalism, the judiciary has the responsibility to balk at meting out such punishment. The justification for not abiding by the legislative mandate lies, partly, in the judicial ability to compare the sentences imposed on other criminals convicted of offenses in the same jurisdiction, and then to determine whether the questioned sentence is disproportionate to those other sentences. This prong is not unworkable and is not difficult to achieve. The consulting of the readily accessible annotated criminal statute books of a given state provides a ready answer to the inquiry required under this prong.

However, on this ground alone, one would not find relief under *Solem v. Helm* unless it were demonstrable that other persons convicted of this type of crime in other jurisdictions had sentences imposed on them significantly less severe than Respondent's.

3. Prong Three: Comparing the Sentences Imposed For The Same Crime In Other Jurisdictions.

This prong calls for a comparison of the sentences imposed for the same crime in other jurisdictions, and determining whether the questioned sentence is disproportionate to those other imposed sentences. In other words, if it were a common legislative practice in the several states to require a mandatory mitigated sentence of 40 years for every young man guilty of fornicating with a girl just under the age of 15 years, then, technically, under *Solem v. Helm*, no defendant would be entitled to judicial relief.

The Petitioner takes the position that this prong actually means any sentence imposable in other jurisdictions rather than any sentence actually imposed. This argument is, first, incorrect, and, second, continues to fail in that no other jurisdiction in the United States has a sentencing judge been compelled to impose a 40 year mitigated mandatory sentence in a case such as the one before the bench. The sentence imposed in *State v. Bartlett* is an historical event, of dubious value, in Anglo-American jurisprudence.

As far as Respondent is able to understand the Petitioner's argument, the State claims that this prong is unworkable because an actual comparison among the states is an impossible task. Based on the alleged difficulty involved, the State of Arizona advocates the reversal of *Solem v. Helm*,

and, in turn, *State v. Bartlett*. To illustrate the point, The Petitioner has attached to it's Petition for Writ of Certiorari a chart, which Petitioner's counsel has claimed to have constructed. Because the Petitioner relies heavily on this point, several impugning points need to be made.

The first point regards the object that this chart seeks to demonstrate. The Petitioner has placed 26 stars next to 26 states and the legend refers to these states as "states having potential sentencing parameters consistent with those in Arizona." This legend is not factual. A truthful statement would be that these states have the potential ability to sentence the Respondent to a sentence as was imposed in Arizona. For Petitioner's chart legend to be truthful, it would be necessary to show that other states share Arizona's sentencing "parameters" in like cases. The fact is none do. There is not one other state in the Union that mandates the imposition of 15 to 25 year sentence for a like crime. Other states provide a wide range of sentences. For example, Montana provides that, if the Respondent were sentenced there, he could receive a sentence ranging from 2 to 40 years. The offense punishable under the Montana statute involves having sexual relations with a female from birth to the age of 16 years. This is not the same "sentencing parameters" as in Arizona. Parameter, in the plural sense, has always conveyed the meaning of two or more constant determining factors or

characteristics in which given variables lie between. In this case, the constant determining characteristics are the minimum and maximum sentence allowed, under statute, for having sexual relations with a 14 year old girl. Again, no other state mandates a minimum sentence of 15 years. The states with the next highest minimum sentences are Delaware and Kansas, the minimum sentence in each of those states being 3 years. The Petitioner has misrepresented a crucial fact to this Court when counsel states that 26 other states have similar sentencing "parameters" as Arizona.

The second point regarding the Petitioner's chart is, that, when possible, there is listed therein the more grave offense of child molestation, and the consistently harsh penalties associated with that offense. This is even done when the controlling statute, which would be applicable to this case, is available. An example is the first two listed, Alabama and Alaska. There is no reason to include offenses committed on 11 and 12 year old girls, which carry the stern sentences one could expect to see in those types of cases. None of the references to these types of statutes are relevant. It is submitted that they are given to serve two disingenuous purposes: First, to convince this Court that there is a uniformity in treatment among the states with regard to sentencing others similarly situated, and in this sense, these references only serves to place an appearance of consis-

tency where it does not belong; and, second, with painstaking effort, to attempt to present a mirage that the satisfaction of this prong is a confusing impossibility and, thus, unworkable. In answering a simple question such as: "What is the range of sentencing in Alaska for the offense of having consensual intercourse with a girl over 14 years of age yet under 15 years of age?" Petitioner's answer is:

> § 12.55.125
> # > 30 yrs; if conv., 8 yrs;
> if 2nd, 15 yrs; if > 2, 25 yrs/#
> > 10 yrs, nor < 4 yrs,
> if 2nd conviction

Petitioner's answer serves not to clarify, but only to confuse. The answer is simply 1 to 10 years for the first conviction, and 4 to 10 years for the second conviction.

The Petitioner's chart has been represented by counsel as being their work-product, the result of much diligent effort on their part. Based on the alleged difficulty involved, it is further alleged by Petitioner that this prong is unworkable. Actually, the State's effort in this regard is exaggerated. Respondent provided both counsel and the Arizona Appellate Courts the citations to the relevant state criminal statutes in the second brief filed by Respondent on October 12, 1988, in the Arizona Court of Appeals. It is not the

unacknowledged use of this information that is objectionable; rather, it is the implied contention by Petitioner that the assembly of same is a difficult process that nets a complicated and obscure result. The assembly is time consuming, yet neither impossible nor even of exceeding difficulty. The results may be presented in an obscured, untruthful, and complicated manner, or they can be represented in a clear and intelligible manner. The satisfaction of this prong is not unworkable.

4. Workability Under Differing Interpretations.

Aside from the Petitioner's aforesaid allegations that the individual prongs of the test pronounced by the *Solem v. Helm* Court, are unworkable, the Petitioner maintains that the precedent in *Solem v. Helm* is also unworkable because certain other states supposedly misapplied or misinterpreted the decision. The Respondent questions the Petitioner's standing to challenge *Solem v. Helm* because the highest Court in Maryland may have been in error in *State v. Davis*, 310 Md. 611, 530 A.2d 1233 (1987), as cited by Petitioner. Other states' interpretations of *Solem v. Helm* cannot affect a given state's interpretation of *Solem v. Helm*, nor the objectivity of the three prongs enunciated in that decision. *Solem v. Helm* did not require, as a part of its proportionality analysis, that a given state reconcile the rule of *Solem v. Helm* with the interpretation of that decision by other states.

Regardless of another state's interpretation, Arizona should concern itself with the appellate process of decisions resulting in its own jurisdiction. Moreover, it is submitted that the State of Arizona is not sincerely concerned with the academic method in which our State Supreme Court interpreted *Solem v. Helm.* It is noteworthy that the instant case was consolidated with *State v. Jonas*, 792 P.2d 705 (Ariz. 1990), which resulted in a favorable holding to the State of Arizona. *Solem v. Helm*, however, was applied with equal interpretation to both cases. The distinguishment only lies in the result, not the method by which the result was obtained.

The interpretation that the Arizona Supreme Court gave *Solem v. Helm* is what is relevant and is argued in the next section.

D. Fundamental Precedents and Settled Expectations.

In concluding the present section regarding the status that *Solem v. Helm* is to be accorded via the doctrine of *stare decisis*, reference is made to the dissertation authored by Mr. Justice Stevens, Stevens, *The Life-Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1 (1983). Mr. Justice Stevens recognized that there are some constitutional decisions which so many other institutions and people have built upon, that they should not be overturned, even if they are thought to be wrong, since they have become a part of the structure of this nation. This type of decision has become so interwoven into

our concept of what the law stands for that to overrule such decisions would greatly undermine the public perception of the law as being a stable institution upon which one could rely. As such, this type of decision should enjoy a more special status with regard to *stare decisis* than other precedents. See also, Cooper, *Symposium: The Federalist Society Sixth Annual Symposium On Law And Public Policy; The Crisis In Legal Theory And The Revival Of Classical Jurisprudence: Stare Decisis: Precedent And Principle In Constitutional Adjudication.* 73 Cornell L. Rev. 401.

An example given is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built upon that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that the broad interpretation was wrong as a matter of original intent, to tear it down or overturn it. As another example, there may be those who maintain that *Brown v. Board of Education*, 347 U.S. 483 (1954), was erroneously decided (See R. BERGER, *Government by Judiciary, pp.* 116-133 (1977)). Even if believed true, it certainly is among those cases that would qualify for a special application of *stare decisis*, because it is a landmark decision.

Solem v. Helm is also a landmark decision. Every state in the Union has accorded due respect and given serious weight

to this decision and structured its constitutional law accordingly. To inform the States that this Court has changed it's mind on the far reaching fundamental constitutional precedent of *Solem v. Helm*, is also to tell them that reliance on this Court's authority is detrimental to the construction and development of their own constitutional common law. The States will be told to start again on Eighth Amendment analysis, and rely on yet other authority of this Court. The countermanding of this Court's precedent decisions regarding far reaching Eighth Amendment review issues, would render the States' reliance on this Court's authority, dictated by *stare decisis*, an unworkable proposition, rather than the precedent decision itself being unworkable.

The doctrine of *stare decisis* should not be taken lightly or treated cavalierly.

SECOND ARGUMENT:

THE ARIZONA SUPREME COURT CORRECTLY APPLIED THE DOCTRINE SET FORTH IN *SOLEM v. HELM*.

1. Proportionality Analysis As Applied by the Arizona Supreme Court.

Before beginning a discussion of the Arizona Supreme Court's application of *Solem v. Helm* to the facts of this case, it is important to remember that the Arizona Supreme Court had previously utilized a similar proportionality analysis as set forth in *Solem v. Helm*, even before that case

was decided, in evaluating whether a particular punishment was cruel and unusual. *State v. Mullally* 127 Ariz. 92, 618 P.2d 586 (1980).

It is also instructive to examine what the Arizona Supreme Court did not hold in assessing its application of *Solem v. Helm* to this case. The Arizona Supreme Court did not hold that the legislature has no right to determine that girls under the age of 15 years are incapable of giving consent, nor did it state that consensual sexual intercourse with such girls should be declared non-criminal. To the contrary, the Arizona Supreme Court left totally intact the statute under which Mr. Bartlett was tried (A.R.S. §13-1403) and the two offenses' classification as Class 2 felonies, one to serve as a prior to the other, for punishment enhancement purposes, pursuant to the sentencing authority of A.R.S. §13-604(H) and 13-701. The Arizona Supreme Court thus did not redefine Mr. Bartlett's crimes to be sentenced within a range of parameters "promulgated" by the Arizona Court as Petitioner argues.

Likewise, the Arizona Supreme Court did not hold that the legislature has no right to enact mandatory sentencing statutes, such as A.R.S. §13-601.01. In fact, as will be noted in the companion case of *State v. Jonas*, 972 P.2d 705 (1990), consolidated with this case for oral argument, a copy of which is included as Appendix G, the Arizona Supreme Court refused to set aside a young man's mandatory sentence under

A.R.S. §13-601.01 for the sale of one marijuana cigarette for $1.00 to a 14 year old boy, who was no stranger to crime. Hence, the Arizona Supreme Court has refused to open the flood gates of litigation as Petitioner suggests.

The significance in *State v. Bartlett* is that, to the extent that the substantive statute A.R.S. §13-1405 classifies Joe Bartlett's offense on equal par with that of raping two infant children and the sentencing statute A.R.S. §13-604.01 mandates an equally severe sentence of 40 years without the possibility of parole, the entire statutory scheme, in this exceedingly narrow instance, has deprived the sentencing judge from making any meaningful individualized distinction in punishment for the two totally distinct crimes, thereby giving rise to the mandatory imposition of cruel and unusual punishment.

In addition to the fact that both in *Bartlett* and in *Solem v. Helm*, the respective defendants received their lengthy sentences without the possibility of parole, we have the added fact that only in Arizona did the Defendant have to be sentenced necessarily to a minimum of 40 years in prison. Unlike Bartlett, Helm could have been sentenced to less than 25 years. In Bartlett, all meaningful discretion had been taken away from the judiciary to cure the broad sweep of A.R.S. §13-1405, which classifies both the torturing rape of an infant and the consensual intercourse with a fully devel-

oped girl almost 15 years old as the same type of Class 2 felony.

2. PRONG ONE: Gravity Of The Offense And Harshness Of the Penalty.

Solem v. Helm analysis begins with an examination of the severity of the offense *vis-a-vis* the harshness of the penalty. This prong is discussed above in the First Argument of this Brief; however, Respondent would add that Mr. Bartlett's initial sentence of 40 years is more than 1 1/2 times as great as the "penultimate" life sentence without the possibility of parole for 25 years, which was stricken down by the Court in *Solem v. Helm*. That sentence would be, in effect, a sentence to death in prison because it is life in prison for virtually the rest of Mr. Bartlett's natural life expectancy. Hence, even if the sentencing judge had given him the aggravated sentence of 60 years, as a practical matter, that would not have made much difference in the amount of time Mr. Bartlett ultimately would have to serve. He has only one life to live and it is submitted that the average number of years allotted unto the average prison inmate is less than the usual three score and ten.

3. PRONG TWO: Sentences For Other Crimes In Arizona.

The second prong of the analysis focuses upon the sentences imposed upon other criminals in the State of Arizona. This Court stated in *Solem v. Helm* that this prong

is tested by looking at the sentences of other criminals who have committed worse offenses, to see whether such sentences are as harsh or less harsh than that imposed in this case.

The Petitioner argues that we can only make a comparison with those "offenses committed against children" and thus, actually punished under A.R.S. §13-604.01, claiming that the Arizona Supreme Court "refused to make" such a comparison. That is patently false. *State v. Bartlett, supra,* 792 P.2d at 699. Furthermore, the State, in order to compel a comparison of Mr. Bartlett's acts with those who have been convicted of gross pedophilia, makes the argument that the only analysis allowable is a comparison with offenses committed against children. Even if that comparison were the only analysis required, this prong of the test most certainly has been met for the reason the Arizona Supreme Court made the comparison that crimes such as the molestation of a two year old baby carries a mandatory term of 12 to 22 years (A.R.S. §13-604.01 (B)), while the far less severe crime of sex with an experienced 14 year old carries a mandatory term of 15 to 25 years (A.R.S. §13-604.01(A)). This prong would also be met, under the same constraint as the Petitioner suggests, by considering the fact that the second degree murder of a child carries the same penalty by the same statute as the infinitely less serious crime for which Mr. Bartlett was convicted.

In this case, where there was no question but that the girls gave meaningful consent and that they were, for all practical purposes no different after then before the sexual conduct, the Arizona Supreme Court had no difficulty in finding that all dangerous offenses, either with a weapon or where serious physical injury occurs, are potentially more serious than Mr. Bartlett's offenses. Id. at 700. Nevertheless, in such instances, even for dangerous Class 2 felonies, such as armed robbery (A.R.S. §13-1904) and kidnapping (A.R.S. §13-1304), the minimum sentence for a second offense, with one Class 2 felony, dangerous prior, is 14 years, with the possibility of parole upon having served 2/3 of the sentence. A.R.S. §13-604.01(G). It is very clear that the Arizona Supreme Court correctly concluded that, in Arizona, less severe sentences are imposable on defendants who commit crimes far more serious than that of Mr. Bartlett.

It should be pointed out in connection with the foregoing that had the Arizona Supreme Court carried its analysis further it would have been able to find that the ultimately more serious crime of second degree murder of an adult, which is a Class 1 felony (A.R.S. §13-1104), is punishable by imprisonment for a minimum of 10 years, of which the Defendant would have to serve 2/3 of his term.

Finally, it is instructive to analyze this prong a different way, as was done by the Arizona Supreme Court, by

examining what sentence Respondent would have received had he waited a few months to have sex with the girls after their 15th birthday. Id. at 698. The acts would have been the same, the victims have been no different, and yet, the sentence would have been a maximum of 1.87 years for the first count, three years for the second count, if the first count served as a prior, with the possibility of a suspended sentence and probation. (A.R.S. §§13-1405, 13-701, 13-702, and 13-901).

There is no question but that there is a great disparity in sentences imposed on other criminals and similarly situated defendants in the State of Arizona. Prong two of the *Solem v. Helm* test, therefore, was correctly applied.

4. PRONG THREE: Sentences For Similar Offenses In Other States.

The final factor in the *Solem v. Helm* analysis, involves a comparison of sentences imposed and imposable on similarly situated defendants in other jurisdictions. Since the Respondent was sentenced separately on each count, with the sentences to be served consecutively, it is important to compare the counts separately in determining what he would have received in other jurisdictions. The Petitioner claims that the Arizona Supreme Court limited its comparison only to those sentences actually "imposed" and not "imposable". In like manner as the State's argument in Prong Two, this is patently false. *Id.* at p. 701-703.

In Arizona, the minimum penalty for first offense sexual intercourse with a consenting 14 year old adolescent is every day of 15 years. As appears more fully in the sentencing chart, annexed as Appendix "F", the minimum "parameter" for the same offense in all other 49 states and in the District of Columbia is three years at the most. Indeed, some states treat the same conduct as a misdemeanor or no crime at all, and most of the remaining jurisdictions provide a minimum term of one or two years. Even in those jurisdictions where the possible maximum parameters would be as high or higher than the maximum in Arizona, at least the judge has the discretion to impose a minimum of three years or less.

Even a brief look at the annexed sentencing chart compels the conclusion that Arizona's mandatory sentencing scheme is totally out of line with the rest of the states. As the Arizona Supreme Court recognized, that to argue, as the Petitioner does here, that Mr. Bartlett could have gotten 15 years or more elsewhere on a first offense really begs the question and does not excuse the result for the reason that only in Arizona would he necessarily have received the 15 years on the first count. Id. at 700-701. Even more alarming is that, only in Arizona, would Mr. Bartlett necessarily have received 40 years for both offenses as the minimum term.

While it is true that a number of states do provide for enhanced punishment on a second offense, there is not one

jurisdiction where there would be a mandatory minimum of anywhere near every day of 25 years for the second separate offense of consensual sexual relations, let alone where the second offense is stacked, at the option of the prosecutor, upon the first predicate felony in the same indictment, to be served consecutively. Although in Nebraska, a person convicted of sexual assault in the first degree would receive 25 to 50 years for a second offense involving a child under 16, punishment under that statute, as pointed out by the Arizona Supreme Court, has only involved more heinous non-consensual offenses. *Id.* at p. 703. Finally, as the Arizona Supreme Court recognized, the State of Arizona cited no case authority and there did not appear to be any from another jurisdiction, where a criminal defendant received a sentence even remotely similar to that of Joe Bartlett for a similar offense, even where such a sentence might be permissible under that state's sentencing scheme. Id. at p. 702.

By concentrating on what might hypothetically be "imposable" in other jurisdiction, but ignoring what really happens, as is memorialized in published opinions, the Petitioner has entered the ivory tower of possibilities and left reality far behind. For that reason, perhaps in discussing sentences actually imposed in the State of Nevada, this Court stated in *Solem v. Helm, supra,* at 298 that, "we must compare the sentences <u>imposed</u> for commission of the same crime in other

jurisdictions." (emphasis added). The Petitioner's argument that the Arizona Supreme Court misapplied that test by focusing on what is "imposed" as opposed to "imposable" is patently incorrect.

It can be argued, of course, that one state will always prescribe the most severe penalty. Petitioner thus argues that a *Solem v. Helm* analysis tramples on the fundamental concepts of federalism. One state's having the most severe penalty is simply inherent in our system of federalism. There comes a point, however, where the harshest state penalty, in a given rare instance, is so out of line with the rest of the States' penalties and with its own system of jurisprudence, such as in this narrow instance, that it is clearly walking on a separate path of jurisprudence, completely off the track from the federal constitutional proscription against the imposition of cruel and unusual punishment. It is precisely these extremely rare situations which the analysis in *Solem v. Helm* is designed to remedy.

CONCLUSION

In this present case, there is no question but that the Arizona Supreme Court correctly applied the three prong test of *Solem v. Helm* in determining that Mr. Bartlett's sentence of every day of 40 years for having consensual sex with the two fourteen year old girls constituted cruel and unusual punishment.

It is conceded that in the usual situation an appellate court should not step in as a superlegislature to disturb the determination of the elected legislature. However, when the legislature enacts a statute which, in broad sweeps, demands an absurd result in a rare case, giving rise to the imposition of cruel and unusual punishment, the Court must exercise its power of judicial review to declare unconstitutional the application of such a statute in such rare circumstances.

The Court must be circumspect in protecting the autonomy envisioned for the judiciary within our Constitution. This Court's opinion in *Solem v. Helm* is consistent with the protection of such autonomy in the checks and balances scheme.

Further, that most basic and ancient principle of law, *stare decisis*, dictates that *Solem v. Helm* should not be overturned for it is neither unworkable nor has it been rendered irrelevant by changed conditions or subsequent precedent. A *Solem v. Helm* analysis may involve a lot of work, but that certainly does not make it unworkable, as claimed by the Petitioner. It is submitted that where questions of cruel and unusual punishment are raised and where everyday of 40 years of a man's life is at stake, the fact that a lot of work must be done in comparing statutes and sentences actually imposed for similar offenses, is truly insignificant. The burden imposed does not equate with unworkability.

Finally, counsel for the Petitioner has informed the undersigned that in her Reply, she will ask this Court to hold this case for resolution pending the outcome in *Harmelin v. Michigan*, Supreme Court Case No. 89-7272, which is also addressing the issue of revisiting *Solem v. Helm*. Respondent requests that the Court refuse to do so for the reason that the offenses and facts involved in the *Harmelin* case are totally different from those of the *Bartlett* decision.

For the above reasons, Respondent asks that this Court deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

DAVID P. FLANNIGAN
Attorney at Law, P.C.

By: David P. Flannigan
David P. Flannigan
Attorney for Respondent

CERTIFICATE OF SERVICE

TWO COPIES of this Brief were mailed this ____ day of October 1990, to:

Vicki Gotkin Adler
Assistant Attorney General
Criminal Division
1275 W. Washington, First Floor
Phoenix, Arizona 85007

DAVID P. FLANNIGAN
Attorney at Law, P.C.
P.O. Box 4340
Bisbee, AZ 85603

§ 13–1405. Sexual conduct with a minor; classifications

A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

B. Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to § 13–604.01. Sexual conduct with a minor fifteen years of age or over is a class 6 felony.

Added by Laws 1977, Ch. 142, § 63, eff. Oct. 1, 1978. Amended by Laws 1983, Ch. 202, § 8; Laws 1985, Ch. 364, § 18, eff. May 16, 1985.

Historical Note

Source:

Pen.Code 1901, §§ 230, 233.
Pen.Code 1913, §§ 231, 234.
Rev.Code 1928, § 4596.
Code 1939, § 43–4901.
A.R.S. former §§ 13–611, 13–614.
Laws 1962, Ch. 52, §§ 1, 2.
Laws 1967, Ch. 62, § 9.
Laws 1976, Ch. 111, § 5.

The 1983 amendment deleted at the end of subsec. A "and who is not his or her spouse"; and rewrote subsec. B, which had read:

"Sexual conduct with a minor under fifteen years of age is a class 2 felony. Sexual conduct with a minor fifteen years of age or over is a class 6 felony."

The 1985 amendment rewrote subsec. B which read:

"Sexual conduct with a minor under fifteen years of age is a class 2 felony, and the person convicted is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the sentence imposed by the court has been served. Sexual conduct with a minor fifteen years of age or over is a class 6 felony."

Former § 13–1405 was renumbered as § 13–3885.

1983 Reviser's Note:

In the section heading "molestation of a minor;" was deleted pursuant to authority of § 41–1304.02.

§ 13–604.01. Dangerous crimes against children; sentences; definitions

A. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving second degree murder, sexual assault, taking a child for the purpose of prostitution, child prostitution or sexual conduct with a minor or involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

B. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or kidnapping shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

C. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving sexual abuse shall be sentenced to a presumptive term of imprisonment for

ten years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years.

D. The presumptive sentences prescribed in subsections A, B and C of this section may be increased or decreased by up to five years pursuant to the provisions of § 13–702, subsections C, D and E.

E. A person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the sentence imposed by the court has been served.

F. A person who stands convicted of any dangerous crime against children in the first degree having been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until the person has served not fewer than thirty-five years.

G. Notwithstanding chapter 10 of this title,[1] a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for ten years. The presumptive term may be increased or decreased by up to five years pursuant to § 13–702, subsections C, D and E. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis until the person has served not less than one-half the sentence imposed by the court.

H. Section 13–604, subsections H and I apply to the determination of prior convictions.

I. In addition to the term of imprisonment imposed pursuant to this section and notwithstanding any other law, the court shall order that a person convicted of any dangerous crime against children in the first degree be supervised on parole after release from confinement on such conditions as the court or the board of pardons and paroles deems appropriate for the rest of the person's life. If the person is convicted of any dangerous crime against children in the second degree the court, in addition to any term of imprisonment imposed or in lieu of the term if probation is otherwise authorized, may order that the person convicted be supervised on probation or on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for any term up to the rest of the person's life.

J. The sentence imposed on a person by the court for a dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time.

K. In this section:

1. "Dangerous crime against children" means any of the following committed against a minor under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as defined in § 13–3623, subsection B, paragraph 1.

(i) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in § 13–3206.

(*l*) Child prostitution as defined in § 13–3212.

(m) Involving or using minors in drug offenses.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense.

2. "Predicate felony" means any felony involving child abuse, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Added by Laws 1985, Ch. 364, § 6, eff. May 16, 1985. Amended by Laws 1987, Ch. 166, § 1; Laws 1987, Ch. 307, § 4.

[1] Section 13–1001 et seq.

Historical Note

Laws 1987, Ch. 166, § 1, provided in subsec. A for taking a child for the purpose of prostitution and child prostitution, and add pars. (1)k and 1(*l*) to subsec. K.

Laws 1987, Ch. 307, § 4, provided for involving a minor in a drug offense in subsec. A, and added subsec. K1(m).

Former § 13–604.01, added by Laws 1982, Ch. 322, § 2, amended by Laws 1983, Ch. 32, § 1, Laws 1984, Ch. 163, § 1, and Laws 1985, Ch. 227, § 1, and relating to punishment for offenses committed while released from confinement, was renumbered as § 13–604.02 by Laws 1985, Ch. 364, § 5, effective May 16, 1985.

1987 Reviser's Note:

This section contains the amendments made by Laws 1987, Ch. 166, § 1 and Ch. 307, § 4, which were blended together as shown above pursuant to authority of § 41–1304.03.

§ 13-701. Sentence of imprisonment for felony; presentence report

A. A sentence of imprisonment for a felony shall be a definite term of years and the person sentenced, unless otherwise provided by law, shall be committed to the custody of the state department of corrections.

B. No prisoner may be transferred to the custody of the state department of corrections without a certified copy of the judgment and sentence, signed by the sentencing judge, and a copy of a recent presentence investigation report unless the court has waived preparation of the report.

C. Except as provided in § 13-604 the term of imprisonment for a felony shall be determined as follows for a first offense:

1. For a class 2 felony, seven years.
2. For a class 3 felony, five years.
3. For a class 4 felony, four years.
4. For a class 5 felony, two years.
5. For a class 6 felony, one and one-half years.

Added as § 13-901 by Laws 1977, Ch. 142, § 57, eff. Oct. 1, 1978. Renumbered as § 13-701 and amended by Laws 1978, Ch. 201, §§ 104, 105, eff. Oct. 1, 1978. Amended by Laws 1988, Ch. 66, § 1.

Historical Note

Source:

Rev.Code 1928, § 4585.
Code 1939, § 43-2903.
A.R.S. former § 13-453.

The 1978 amendment substituted "shall be a definite term of years and the person sentenced unless otherwise provided by law, shall be committed to the custody of the department of corrections" for "except as provided in § 13-704, shall be a presumptive sentence" in subsec. A, and inserted "except as provided in § 13-604" in subsec. B.

The 1988 amendment inserted "state" preceding "department" in subsec. A; inserted subsec. B; and redesignated former subsec. B as subsec. C.

Section 13-701 as added by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978, was transferred and renumbered as § 13-601; see italicized note preceding this section.

Original § 13-701, derived from Pen.Code 1901, §§ 30, 31, 33; Pen.Code 1913, §§ 30, 31, 33; Rev.Code 1928, § 4492; Code 1939, § 43-5701, and defining treason and provided punishment therefor, was repealed by Laws 1977, Ch. 142, § 23, eff. Oct. 1, 1978.

For disposition of the subject matter of sections of the former Criminal Code, see Disposition Tableat the front of this volume

1978 Reviser's Note:

Pursuant to authority of § 41-1304.02, a comma was added after the word "sentenced" in subsection A, and the words "Except as provided in § 13-604" were transposed to the beginning of the sentence in subsection B.

§ 13–604. Dangerous and repetitive offenders; definition

A. Except as provided in subsection F of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony, whether a completed or preparatory offense, and who has previously been convicted of any felony within ten years next preceding the date of the present offense shall be sentenced to imprisonment for not less than the sentence and not more than twice the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than one-half of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

B. Except as provided in subsection G of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 2 or 3 felony, whether a completed or preparatory offense, and who has previously been convicted of any felony shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a

sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

C. Except as provided in subsection F or N of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony, whether a completed or preparatory offense, and who has been previously convicted of two or more felonies shall be sentenced to imprisonment for at least twice the sentence and not more than three times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

D. Except as provided in subsection G or N of this section or § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 2 or 3 felony, and who has been previously convicted of two or more felonies, shall be sentenced to imprisonment for at least twice the sentence and not more than four times the sentence authorized by § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

E. A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of any misdemeanor or petty offense, other than a traffic offense, and has been convicted of one or more of the same misdemeanors or petty offenses within two years next preceding the date of the present offense shall be sentenced for the next higher class of offense than that for which such person currently stands convicted.

F. Except as provided in § 13–604.01, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument without having previously been convicted of any felony shall be sentenced to imprisonment for not less than the sentence and not more than

twice the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than one-half of the sentence imposed by the court has been served. Except as provided in § 13–604.01, upon conviction of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument a person who has once previously been convicted of any felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument shall be sentenced to imprisonment for twice the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in subsection N of this section or § 13–604.01, upon conviction of a class 4, 5 or 6 felony involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument a person who has been previously convicted of two or more felonies involving the intentional or knowing infliction of serious physical injury or the use or exhibition of a deadly weapon or dangerous instrument shall be sentenced to imprisonment for three times the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E.

G. Except as provided in § 13–604.01, upon a first conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon conviction of a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in § 13–604.01, upon conviction of a class 2 or 3 felony involving the

use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another, a person who has once previously been convicted of a class 1, 2 or 3 felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another shall be sentenced to imprisonment for twice the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Except as provided in subsection N of this section or § 13–604.01, upon conviction for a class 2 or 3 felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another, a person who has been previously convicted of two or more class 1, 2 or 3 felonies involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another shall be sentenced to imprisonment for three times the sentence and not more than five times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole, work furlough or release from confinement on any other basis except as specifically authorized by § 31–233, subsection A or B until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range, except in the case of a person with two or more class 1, 2 or 3 felony convictions in which case the presumptive term shall be the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E. For the purposes of this subsection in determining the applicability of the penalties provided herein for second or subsequent class 2 or 3 felonies, the conviction for any felony committed prior to October 1, 1978 which, if committed after October 1, 1978, could be a dangerous felony under this section may be designated by the state as a prior felony.

H. Convictions for two or more offenses not committed on the same occasion but consolidated for trial purposes may, at the discretion of the state, be counted as prior convictions for purposes of this section. Convictions for two or more offenses committed on the same occasion shall be counted as only one conviction for purposes of this section.

I. A person who has been convicted in any court outside the jurisdiction of this state of an offense which if committed within this state would be punishable as a felony or misdemeanor is subject to the provisions of this section. A person who has been convicted as an adult of an offense punishable as a felony or a misdemeanor under the provisions of any prior code in this state shall be subject to the provisions of this section.

J. Time spent incarcerated within the ten years next preceding the date of the offense for which a person is currently being sentenced under subsection A of this section and time spent incarcerated within the two years next preceding the date of the offense for which a person is currently being sentenced under subsection E of this section shall not be included in the ten years or two years required to be free of convictions for purposes of those subsections.

K. The penalties prescribed by this section shall be substituted for the penalties otherwise authorized by law if the previous conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while released on bond or on his own recognizance as provided in subsection M of this section is charged in the indictment or information and admitted or found by the trier of fact. The court shall allow the allegation of a prior conviction, the dangerous nature of the felony or the allegation that the defendant committed a felony while released on bond or on his own recognizance at any time prior to the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings, provided that when the allegation of a prior conviction is filed, the state must make available to the defendant a copy of any material or information obtained concerning the prior conviction. Before the trial on the charge of the previous conviction or the allegation that the defendant committed a felony while released on bond or on his own recognizance, the charge of previous conviction or the allegation that the defendant committed a felony while released on bond or on his own recognizance shall not be read to the jury. For the purposes of this subsection, "dangerous nature of the felony" means a felony involving the use or exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another.

L. Intentional failure by the court to impose the mandatory sentences or probation conditions provided in this title shall be deemed to be malfeasance.

M. A person convicted of committing any felony offense, which felony offense is committed while the person is released on bail or on his own recognizance on a separate felony offense, shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense committed while released on bond or on his own recognizance. The additional sentence imposed under this subsection is in addition to any enhanced punishment that may be applicable under any of the other subsections of this section.

N. A person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a serious offense except first degree murder or any dangerous crime against children, whether a completed or preparatory offense, and who has previously been convicted of two or more serious offenses not committed on the same occasion shall be sentenced to life imprisonment and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confine-

ment on any other basis except as specifically authorized by § 31–233, subsection A or B until the person has served not less than twenty-five years.

O. As used in this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state which if committed in this state would constitute one of the following offenses:

1. First degree murder.
2. Second degree murder.
3. Manslaughter.
4. Aggravated assault resulting in serious physical injury or committed by the use of a deadly weapon or dangerous instrument.
5. Sexual assault.
6. Any dangerous crime against children.
7. Arson of an occupied structure.
8. Armed robbery.
9. Burglary in the first degree.
10. Kidnapping.
11. Sexual conduct with a minor under fifteen years of age.
12. A drug related felony offense pursuant to § 13–3404.01, a violation of § 13–3405 involving an amount of marijuana having a weight at the time of seizure of eight pounds or more, a felony violation of § 13–3406 or any violation of §§ 13–3407 through 13–3409.

Added as § 13–704 by Laws 1977, Ch. 142, § 48, eff. Oct. 1, 1978. Renumbered as § 13–604 and amended by Laws 1978, Ch. 201, §§ 98, 101, eff. Oct. 1, 1978. Amended by Laws 1980, Ch. 229, § 7, eff. April 23, 1980; Laws 1981, Ch. 165, § 1; Laws 1982, Ch. 322, § 1; Laws 1984, Ch. 42, § 1; Laws 1984, Ch. 325, § 1; Laws 1985, Ch. 146, § 1; Laws 1985, Ch. 364, § 4, eff. May 16, 1985; Laws 1987, Ch. 307, § 3.

Historical Note

Source:

Pen.Code 1901, §§ 618, 630, 632.
Pen.Code 1913, §§ 726, 738, 739.
Rev.Code 1928, §§ 4898, 4899.
Code 1939, § 43–6112.
Laws 1951, Ch. 110, § 1.
Code 1939, Supp.1952, § 43–6111.
A.R.S. former §§ 13–1649, 13–1650.

The 1978 amendment, in subsec. A, inserted "of this section", substituted "§ 13–701" for "§ 13–901", and substituted "not less than one-half of the sentence imposed by the court" for "the minimum sentence" in the first sentence, in the second sentence substituted "subsection" for "paragraph", deleted "three-fourths of" following "presumptive term" and deleted an exception clause relating to class 6 felonies, and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsection C, D and E" for "13–901.01"; in subsec. B, inserted "of this section", substituted "13–701" for "13–901", "subsection" for "paragraph", and "13–702, subsections C, D and E" for "13–702", and inserted "not less than two-thirds of"; in subsec. C, inserted "of this section", substituted "13–701" for "13–901", and inserted "not less than two-thirds of" in the first sentence, substituted "subsection" for "paragraph" and deleted "three-fourths of", and an exception clause to class 6 felonies in the second sentence, and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01"; in subsec. D, inserted "of this section", substituted "13–701" for "13–901", and inserted "not less than two-thirds of" in the first sentence, in the second sentence substitut-

ed "subsection" for "paragraph", and in the final sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01"; in subsec. E, inserted references to petty offenses and reduced convictions from two to one; inserted subsec. F, and redesignated subsequent subsections; in subsec. G, substituted "or knowing" for "knowing or reckless", "13–701" for "13–901" and inserted "not less than two-thirds of" throughout the first sentence, in the second sentence substituted "subsection" for "paragraph" and added exception, in the third sentence inserted "prescribed under this subsection" and substituted "13–702, subsections C, D and E" for "13–901.01", and added the final sentence; in subsec. H, deleted "or as part of a single continuing course of action" following "some occasion", inserted "at the discretion of the state", and added the second sentence; and in subsec. K, inserted "or the dangerous nature of the felony" in the first and second sentences, inserted "of a prior conviction" in the second sentence and added the final sentence.

The 1980 amendment substituted near the end of subsec. G "if committed after October 1, 1978, could be a dangerous felony under this section" for "carries a penalty of up to life imprisonment". Prior to amendment, subsec. G provided:

"Upon a first conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon conviction of a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for not less than the sentence and not more than three times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon a second conviction of a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon a second conviction for a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for twice the sentence and not more than four times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted, and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon a third or subsequent conviction for a class 2 or 3 felony involving use or exhibition of a deadly weapon or dangerous instrument or upon the third or subsequent conviction for a class 2 or 3 felony when the intentional or knowing infliction of serious physical injury upon another has occurred, the defendant shall be sentenced to imprisonment for three times the sentence and not more than five times the sentence authorized in § 13–701 for the offense for which the person currently stands convicted and shall not be eligible for suspension or commutation of sentence, probation, pardon or parole or release on any other basis until not less than two-thirds of the sentence imposed by the court has been served. Upon imposing a sentence pursuant to this subsection the court shall impose as a presumptive term three-fourths of the median of the allowable range, except in the case of a third or subsequent conviction in which case the presumptive term shall be the median of the allowable range. The presumptive term may be mitigated or aggravated within the range prescribed under this subsection pursuant to the terms of § 13–702, subsections C, D and E. For the purposes of this subsection in determining the applicability of the penalties provided herein for second or subsequent class 2 or 3 felonies, the conviction for any felony committed prior to October 1, 1978 which carries a penalty of up to life imprisonment may be designated by the state as a prior felony."

The 1981 amendment included provisions in subsec. K pertaining to allegations that defendant committed a felony while released on bond or his own recognizance, and added subsec. M.

The 1982 amendment substituted throughout the section "work furlough or release from confinement on any basis except as specifically authorized by § 31–233, subsection A or B" for "or release on any other basis".

Laws 1982, Ch. 322, § 10 provides:

"Notwithstanding the provisions of this act, the legislature intends that, if the provisions of title 41, chapter 20 [§ 41–2351 et seq.], Arizona Revised Statutes, operate to terminate the state department of corrections or the board of pardons and paroles, any provisions regarding powers, duties, functions or personnel added or amended by this act terminate on the date of termination of the agency affected."

Laws 1984, Ch. 42, § 1, substantially rewrote provisions for multiple subsequent offenses involving deadly or dangerous weapons in subsec. G.

Laws 1984, Ch. 325, § 1, inserted exception pertaining to subsec. N in subsecs. F and G, and added subsec. N.

Laws 1985, Ch. 146, § 1, in subsec. K modified the second sentence by substituting "shall" for "in its discretion may", and inserting "the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings".

Laws 1985, Ch. 364, § 4, inserted in subsecs. F and G references to § 13–604.01; inserted in subsec. N "or any dangerous crime against children" and substituted same for "Child molestation" as subsec. *O*, 6; and added subsec. *O*, 11.

The 1987 amendment added subsec. *O*, 12.

Former § 13–604 was transferred and renumbered as § 13–1004; see italicized note preceding § 13–601.

Reviser's Notes:

1984 Note. Prior to the 1985 amendments, this section contained the amendments made by Laws 1984, Ch. 42, § 1 and Ch. 325, § 1 which were blended together pursuant to authority of § 41–1304.03.

1985 Note. This section contains the amendments made by Laws 1985, Ch. 146, § 1 and Ch. 364, § 4 which were blended together as shown above pursuant to authority of § 41–1304.03.

APPENDIX " E "

S T A T E C A S E S

Alabama: <52 cases>

Industrial Chemical v. Chandler, 547 S.2d 812 (Ala. 1988)

Aetna Life Ins. v. Lavoie, 505 S.2d 1050, (Ala. 1987)

Alabama Power Co. v. Cantrell, 507 S.2d 1295 (Ala. 1987)

Maddox, Callahan and Gillum v. State, 502 S.2d 786 (Ala. 1986).

Harbor v. State, 465 S.2d 460 (Ala. 1985).

Bridges v. State, 563 S.2d 13, (Ala. 1989)

Danahoo v. State, 552 S.2d 887 (Ala. 1989)
505 S.2d 1067 (Ala. 1986)

Johnson v. State, 541 S.2d 1112 (Ala. 1989)

Bethune v. State, 541 S.2d 332 (Ala. 1989)

Moore v. State, 539 S.2d 416 (Ala. 1988)

Hasberry v. State, 533 S.2d 722 (Ala. 1988)

Smith v. State, 529 S.2d 1022, (Ala. 1987)

Baker v. City of Huntsville, 516 S.2d 927 (Ala. 1987).

Kelley v. State, 519 S.2d 1368 (Ala. 1987)

Hammond v. State, 502 S.2d (Ala. 1986)

Atkins v. State, 497 S.2d 598 (Ala. 1986)

Hodges v. State, 500 S.2d 1270 (Ala. 1986)

German v. State, 500 S.2d 478 (Ala. 1986)

Maddox v. State, 502 S.2d 790 (Ala. 1986)

Randle v. State, 554 S.2d 1124 (Ala. 1986)

Tice v. State, 491 S.2d 1065 (Ala. 1986)

Fitts, alias v. State, 482 S.2d 1347 (Ala. 1985)

Burke v. State, 478 S.2d 517 (Ala. 1985)

Olds v. State, 484 S.2d 517 (Ala. 1985)

Weaver, alias v. State, 484 S.2d 1124 (Ala. 1985) 437 So.2d 651 (1983)

Riley v. State, 480 S.2d 32 (Ala. 1985)

Scott v. State, 479 S.2d 1343 (Ala. 1985)

Kennard v. State, 531 S.2d 927 (Ala. 1985)

Fisher v. State, 480 S.2d 6 (Ala. 1985)

Maye v. State, 472 S.2d 688 (Ala. 1985)

Cogburn v. State, 473 S.2d 625 (Ala. 1985)

Speaks v. State, 494 S.2d 713 (Ala. 1985)

McGee v. State, 465 S.2d 685 (Ala. 1985)

Jones v. State, 469 S.2d 713 (Ala. 1985)

Caver, III v. State, 466 S.2d 190 (Ala. 1985)

Taylor v. State, 462 S.2d 1068 (Ala. 1985)

Moreland, Ballard, McGee v. State, 469 S.2d 1305 (Ala. 1985)

Davis v. State, 465 S.2d 1201 (Ala. 1984)

McLester v. State, 460 S.2d 870 (Ala. 1984)

White v. State, 462 S.2d 750 (Ala. 1984)

Wilbourn v. State, 457 S.2d 1001 (Ala. 1984)

Casey v. State, 456 S.2d 1142 (Ala. 1984)

Brooks v. State, 456 S.2d 1142 (Ala. 1984)

Faircloth v. State, 471 S.2d 485 (Ala. 1984)

Norris v. State, 455 S.2d 226 (Ala. 1984)

Minor v. State, 451 S.2d 433 (Ala. 1984)

Anderson v. State, 455 S.2d 957 (Ala. 1984)

Thomas v. State, 447 S.2d 203 (Ala. 1984)

Taylor v. State, 445 S.2d 1004 (Ala. 1984)

Wabbington v. State, 446 S.2d 665 (Ala. 1983)

Hughes v. State, 443 S.2d 1382 (Ala. 1983)

Robertson v. State, 442 S.2d 162 (Ala. 1983)

Minor v. State, 437 S.2d 651 (Ala. 1983)

Alaska: <2 cases>

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Heathcock v. State, 670 P.2d 1155 (Alaska 1983)

Arizona: <37 cases>

State v. Bartlett, 732 P.2d 692 (Ariz. 1990)

State v. Jonas aka Mecklenburg, 792 P.2d 705 (Ariz. 1990)

State v. Taylor aka Pierce, 773 P.2d 974 (Ariz. 1989)

State v. Griffin, 744 P.2d 10 (Ariz. 1987)

State v. Hurley, 741 P.2d 257 (Ariz. 1987)

State v. Dixon, 735 P.2d 761 (Ariz. 1987)

State v. Day, 715 P.2d 743 (Ariz. 1986)

State v. Allie, 710 P.2d 430 (Ariz. 1985)

State v. Cocio, 709 P.2d 1336 (Ariz. 1985)

State v. Borbon, 706 P.2d 718 (Ariz. 1985)

State v. Perkins, 699 P.2d 364 (Ariz. 1985)

State v.Williams, 698 P.2d 724 (Ariz. 1985)

State v. J. Williams, 698 P.2d 678 (Ariz. 1985)

State v. Hutton, 694 P.2d 216 (Ariz. 1985)

State v. Goswisk,, 691 P.2d 673 (Ariz. 1984)

State v. Noriega, 690 P.2d 775 (Ariz. 198)

State v. McNair, 687 P.2d 1230 (Ariz. 1984)

State v. Garcia, 685 P.2d 734 (Ariz. 1984)

State v. Hankins and Satterfield, 686 P.2d 740 (Ariz. 1984)

State v. Smith, 681 P.2d 1374 (Ariz. 1984)

State v. Ross, 67 Ariz. Adv. Rep. 38 (Aug. 21, 1990) Ariz. 1990)

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State v. Waits, 786 P.2d 1067 (Ariz. 1989)

State v. Marquez-Sosa, 779 P.2d 815 (Ariz. 1989)

State v. Byrd, 772 P.2d 1135 (Ariz. 1988)

State v. Olsen, 760 P.2d 603 (Ariz. 1988)

State v. Smith, 753 P.2d 1174 (Ariz. 1987)

State v. Crego, 742 P.2d 289 (Ariz. 1987)

State v. Griffin, 744 P.2d 8 (Ariz. 1986)

State v. Pacheco, 730 P.2d 262 (Ariz. 1986)

State v. Carson, 720 P.2d 972 (Ariz. 1986)

State v. Adams, 703 P.2d 510 (Ariz. 1985)

State v. Johnson, 693 P.2d 973 (Ariz. 1984)

State v. Riley, 684 P.2d 896 (Ariz. 1984)

State v. Flores, 682 P.2d 1136 (Ariz. 1984)

Arkansas: <1 case>

Thompson v. State, 658 S.W.2d 350 (Ark. 1983)

California: <11 cases>

People v. Jennings, 760 P.2d 475 (Cal. 1988)

People v Bunyard, 756 P.2d 795 (Cal. 1988)

People v. Poggi, 753 P.2d 1182 (Cal. 1988)

People v. Dillon, 668 P.2d 697 (Cal. 1983)

People v. Ladanio, 211 Cal.App.3d 1114 (Cal. 1989)

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People v. Courie, 155 Cal.App.3d 415 (Cal. 1984)

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Alvarez v. People, No. 89SC169, (Sept. 10, 1990)(Colo. 1990)

People v. Hernandez, 686 P.2d 366 (Colo. 1984)

People v. Austin, No. 87CA1648, (Apr. 26, 1990) (Colo. 1990)

People v. Herrera, 728 P.2d 366 (Colo. 1986)

People v. Wandel, 713 P.2d 398 (Colo. 1985)

People v. Nieto, 715 P.2d 1262 (Colo. 1985)

People v. Martinez, 689 P.2d 653 (Colo. 1984)

Connecticut: <4 cases>

State v. Hernandez, 528 A.2d 794 (Conn. 1987)

State v. O'Neill, 511 A.2d 321 (Conn. 1986)

State v. Madera, 503 A.2d 136 (Conn. 1985)

State v. Dupree, 495 A.2d 691 (Conn. 1985)

Deleware: <8 cases>

Malloy v. State, 568 A.2d 1072 (Del. 1989)

Pauls v. State, 554 A.2d 1125 (Del. 1989)

Pitts v. State, No. 342 (Sept. 7, 1987) (Del. 1987)

Williams v. State, 539 A.2d 164 (Del. 1988)

Manchester v. State, 532 A.2d 1000 (Del. 1987)

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State v. Dayutis, 498 A.3d 325 (N.H. 1985)

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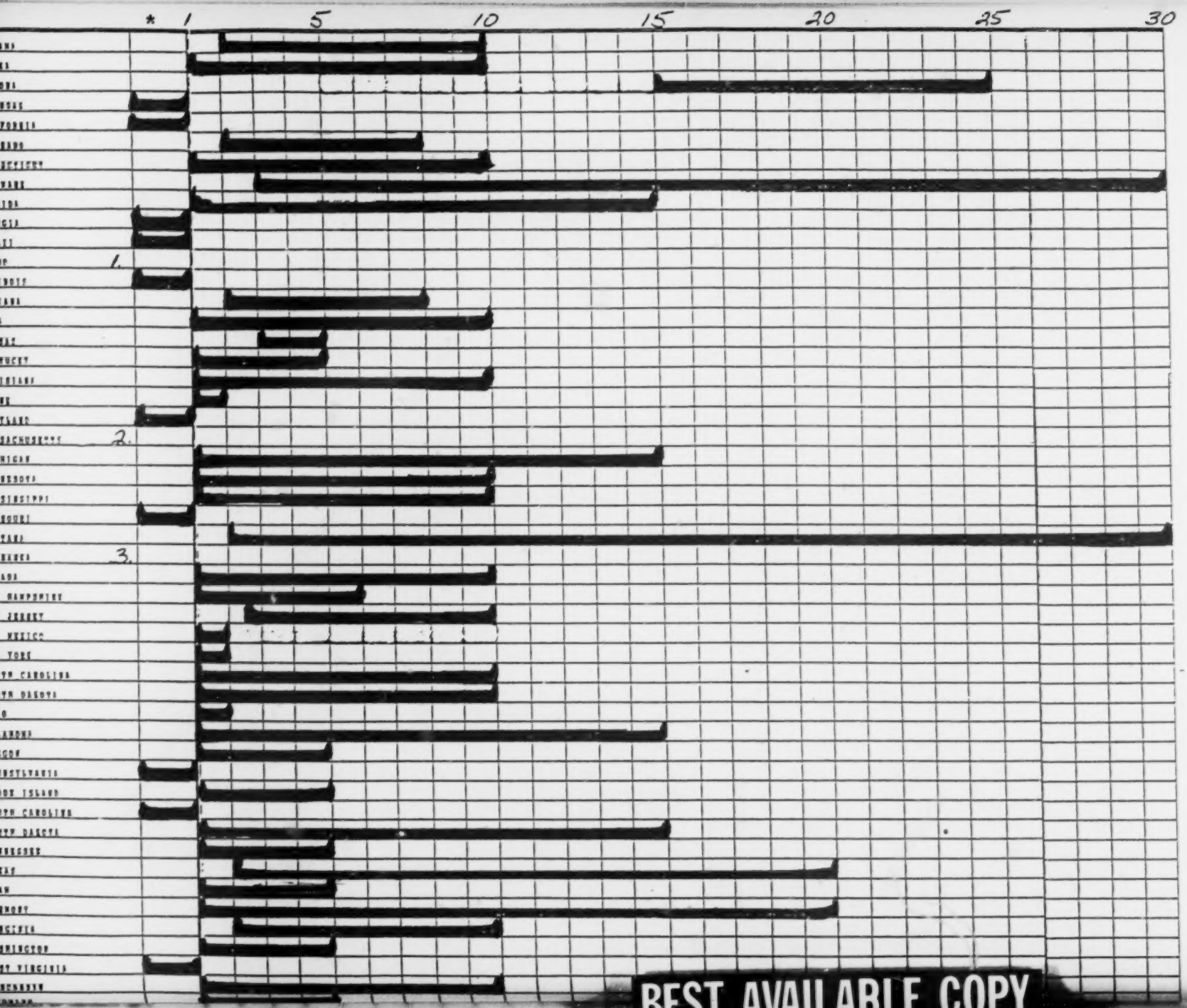

STATUTORY RANGE OF PUNISHMENT

FOR CONSENSUAL SEXUAL INTERCOURSE

WITH A FOURTEEN-YEAR-OLD GIRL

* Indicates states wherein conduct is defined as a misdemeanor or is not a crime

1. A sentence of one year to life at discretion of judge
2. Any term of years, but not less than five years
3. Term of imprisonment varies at a great range of discretion exercised by trial court
4. Any term of years or life at discretion of trial judge

BEST AVAILABLE COPY

ALABAMA.
Ala. Code Section 13A-6-62, Classified as a class "b" felony. Sentencing is provided in Section 13A-5-6, which leaves a wide discretion to be exercised by the trial court. Also, the lesser offense of sexual misconduct is available to avoid undue harshness.

ALASKA.
Alaska Comp. Laws Ann. Section 11.41.43(B) defines the offense as a unclassified felony, punishable under Section 12.55.

ARIZONA.
Statute is defined in detail in Appellant's Opening Brief.

ARKANSAS.
Ark. Stat. Section 5-14-106 is defined as carnal abuse in the third degree, a class A misdemeanor.

CALIFORNIA.
Cal. Pen. Code Section 261.5 and defined as unlawful sexual intercourse, and is a misdemeanor.

COLORADO.
Colo. Rev. Stat. Ann. Section 18-3-405, sexual assault on a child, a class 4 felony, punishable under Section 18-3-403.

CONNECTICUT.
Conn. Gen. Stat. Section 53a-71(1), sexual assault in the second degree, a class C felony, punishable under 53a-35a.

DELAWARE.
Del. Code Ann. Section 773, punishable as a class B felony under Section 4205, and defined as unlawful sexual intercourse. A wide range of punishment is available for the judges discretion.

FLORIDA.
Fla. Stat. Ann. Section 11-18, the offense is only punishable if the victim was previous chaste. Only then is the offense a class 2 felony, punishable under 775.082. A wide range of possible sentencing is left to the discretion of the sentencing judge.

GEORGIA.
Crim. Code of Ga. Section 26-2010, classified as a misdemeanor, entitled fornication.

HAWAII.
Hawaii Rev. Laws Section 707-737, sexual abuse in the second degree, and is classified as a misdemeanor.

IDAHO.
Idaho Code Ann. Section 18-6101, and is defined as rape. The punishment is outlined in 18-6104 by a sentence of one year to life at the discretion of the Judge.

ILLINOIS.
Crim. Code of 1961, Section 11-5, and entitled as contributing to the sexual delinquency of a child. The offense is a class A misdemeanor.

INDIANA.
Ind. Ann. Stat., Art. 42, Ch. 4, Section 35-42-4-3, (c) and is termed child molesting. Punishable as a class C felony under Section 35-50-2-6.

IOWA.
Iowa Code Section 709.4, termed sexual abuse in the third degree, a class C felony. State v. Hughes, (1898) 106 Iowa 125, 76 N.W. 520, 68 Am. St. Pep. 288.

KANSAS.
Kan. Gen. Stat. Ann. Section 21-3503, termed indecent liberties with a child, a class C felony punishable under Section 21-4501.

KENTUCKY.
Ky. Rev. Stat. Section 510.060, termed rape in the third degree, punishable as a class D felony under 510.070(a).

LOUISIANA.
La. Rev. Stat. Section 80, termed carnal knowledge of a juvenile. State v. Sepulvado, 367 So.2d 762, State v. Daniels, 457 So.2d 114.

MAINE.
Me. Rev. Stat. Ann., Section 17-A Section 254 termed sexual abuse of minors, a class D felony, punishable under 17-A Section 1252(b). Punishable by less than one year.

MARYLAND.
Md. Ann. Code Section 27-464(c), termed a forth degree sexual offense, a misdemeanor.

MASSACHUSETTS.
A.L.M. Section 265-23, termed rape of a child and sentencing can be any term of years, but not less than five years.

MICHIGAN.
Mich. Pen. Code Section 28-788(4)(a), termed criminal sexual conduct in third degree.

MINNESOTA.
Minn. Stat. Ann. Section 609.344(1)(b), termed criminal sexual conduct int he third degree punishable under 609.344(2).

MISSISSIPPI.
Miss. Code Ann. Section 97-5-21, termed seduction of a child under age eighteen. The victim must have been of a chaste character.

MISSOURI.
VAMS Section 556-061, not a crime.

MONTANA.
Mont. Rev. Stat. Section 45-5-503, like Alabama, Delaware, Florida, and michigan, the term of imprisonment varies at a great range of discretion exercised by the trial court.

NEBRASKA.
Neb. Rev. Stat. Section 28-319, termed sexual assault in the first degree, a class II felony. See above statute.

NEVADA.
Nev. Rev. Stat. Section 200.364(3), termed statutory sexual seduction, punishable under 200.368(1).

NEW HAMPSHIRE.
New. Hamp. Rev. Stat. Ann. Section 632-A:3 II, a class B felony, punishable under 651:2 II.

NEW JERSEY.
Code of Crim. Just. Section 2C:14-2(c)(5), classified as sexual assault in the second degree, punishable under Section 2c:43-6. a, b(2).

NEW MEXICO.
N.M. Stat. Ann. Section 30-9-13(D) is a class 4 felony.

NEW YORK.
N.Y. Stat. Ann. Section 130.25(2), classified as rape in the third degree, a class E felony, punishable under Section 70.00(e).

NORTH CAROLINA.
N.C. Gen. Stat. Section 14-202.1, is termed taking indecent liberties with children, and a class H felony. Punishment is controlled by Section 14-1.1(8).

NORTH DAKOTA.
N.D. Cent. Code Section 12.1-20-03, termed gross sexual imposition, a class B felony, punishable under 12.1-32-01.3.

OHIO.
Ohio Rev. Code Ann. Section 2907.04, termed corruption of a minor, a third degree felony, punishable under Section 2929(A)(3)(a).

OKLAHOMA.
Okla. Stat. Ann. Section 1114(B), termed rape in the second degree, punishable under Section 1116. Cf. Thompson v. State, 3 P.2d 251 (1931), Sanders v. State, 296 P. 764 (1931), Catts v. State, 244 P. 817 (1926).

OREGON.
Ore. Rev. Stat. Section 163.355, termed rape in the third degree, a class C felony, punishable under Section 161.605.

PENNSYLVANIA.
Pa. Stat. Section 18-3122 provides that there is no crime committed. Age of consent is 14 years.

RHODE ISLAND.
R.I. Gen. Laws Ann. Section 11-37-6, termed third degree sexual assault, punishable under 11-37-7.

SOUTH CAROLINA.
S.C. Code Section 16-3-655, provides that there is no crime committed. The age of consent is 14 years.

SOUTH DAKOTA.
S.D. Codified Laws Section 22-22-1(5), is a class 3 felony.

TENNESSEE.
Tenn. Code Ann. Section 39-2-605 defines statutory rape occurs only when the 14 year old (or older) girl was at any time previously bound, lewd or kept person. Convincing evidence of the victims previous unchaste conduct will not warrant a conviction. In the event that the victim was previously chaste, the offense is a punishable under subsection (b).

TEXAS.
Tex. Pen. Code Ann. Section 22.011 defines statutory rape in the same fashion as Tennessee. The defendant may be sentenced if the victim was previously chaste. A wide range of punishment exists for the discretion of the trial judge.

UTAH.
Utah Code Ann. Section 76-5-401(1), termed unlawful sexual

intercourse, punishable as a third degree felony under 76-3-203(3).

VERMONT.
Vt. Stat. Ann. Title 13 Section 32 52(3), termed sexual assaualt. A wide range of sentencing terms are provided for the judges discretion.

VIRGINIA.
Va. Code Ann. Section 18-2-63, termed carnal knowledge of a child between thirteen and fifteen years of age. A class 4 felony, sentencing provided by Section 19-2-295.

WASHINGTON
Rev. Code of Wash. Ann. Section 9A.44.090(2), is termed statutory rape in the third degree, punishable as a class C felony under 9.94A.310, Table 1.

WEST VIRGINIA
S.Va. Code Ann. Section 61-8B-9(a), termed sexual abuse in the third degree, a misdemeanor.

WISCONSIN
Wis. Stat. Ann. Section 940.225(2)(e), defined as second degree sexual assault a class C felony.

WYOMING
Wyo. Stat. Ann. Section 6-2-304, termed sexual assault in the third degree, punishable under Section 6-2-306(iii).

DISTRICT OF COLUMBIA
D.C. Code Ann. Section 22-2801, punishable under Section 24-203 which provides for imprisonment of any term of years or life. The discretion is left to the trial judge.

STATE of Arizona, Appellee,

v.

Jay Martin JONAS, aka Jay Martin Mecklenburg, Appellant.

No. CR-89-0021-PR.

Supreme Court of Arizona, En Banc.

April 17, 1990.

Defendant was convicted in the Superior Court, Cochise County, No. CR 87-00375, James L. Riley, J., of trafficking in stolen property and transferring marijuana to a minor under the age of 15 years, and he appealed. The Court of Appeals, 162 Ariz. 32, 780 P.2d 1080, affirmed, and defendant petitioned for further review. The Supreme Court, Corcoran, J., held that defendant's 25-year sentence for sale of one marijuana cigarette to a 14-year-old, to be served without parole and consecutive to his 21-year sentence for trafficking in stolen property, was not disproportionate to his crime and therefore did not constitute cruel and unusual punishment.

Affirmed as modified.

Feldman, V.C.J., filed a dissenting opinion.

1. Criminal Law ⇐1213.8(2)

Under three-prong objective test for determining if a sentence is so disproportionate to crime for which it is imposed that it constitutes cruel and unusual punishment, court examines gravity of offense and harshness of penalty, it then compares sentences imposed on other criminals in same jurisdiction for more serious crimes and, lastly, compares sentences imposed in other jurisdictions for the same crime. U.S.C.A. Const.Amend. 8.

2. Criminal Law ⇐1213.8(6)
Drugs and Narcotics ⇐133

Defendant's 25-year sentence for sale of one marijuana cigarette to a 14-year-old, to be served without parole and consecutive to his 21-year sentence for trafficking in

stolen property, was not disproportionate to his crime and therefore did not constitute cruel and unusual punishment. A.R.S. § 13–604.01; U.S.C.A. Const.Amend. 8.

3. Criminal Law ⇐1213.8(2, 5)

Neither mandatory nor consecutive nature of sentence was a factor in determining whether sentence was so disproportionate to crime for which it was imposed that it constituted cruel and unusual punishment; however, whether sentence precluded possibility of parole was a factor in determining its severity. U.S.C.A. Const. Amend. 8.

4. Criminal Law ⇐1210(1)

A defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts.

5. Criminal Law ⇐1213.8(2)

In comparing punishments for more serious crimes, for purposes of determining whether sentence is so disproportionate to crime for which it is imposed that it constitutes cruel and unusual punishment, court considers what the punishment would be for a criminal with defendant's prior criminal history. U.S.C.A. Const.Amend. 8.

Robert K. Corbin, Atty. Gen. by Bruce M. Ferg, Asst. Atty. Gen., Tucson, Vicki Gotkin Adler, Asst. Atty. Gen., Phoenix, for appellee.

Dickerson & Rheinheimer by Timothy B. Dickerson, Sierra Vista, for appellant.

Robert F. Arentz, Cochise County Public Defender by James L. Conlogue, Deputy Public Defender, Bisbee, amicus curiae for Cochise County Public Defender.

Harrison, Harper, Christian & Dichter, P.C. by Stephen M. Dichter, Phoenix, amicus curiae for Arizona Attorneys for Criminal Justice.

OPINION

CORCORAN, Justice.

Defendant Jay Martin Jonas (defendant) petitions for review of the court of appeals decision affirming his convictions for trafficking in stolen property and transferring marijuana to a minor under the age of 15 years, and his resulting *consecutive* sentences totalling 46 years. We granted review of the following question:

Under the facts of this case, does the 25–year sentence, imposed consecutively to the other sentence, violate the proscription against cruel and unusual punishment when imposed for the act of selling to a 14–year–old minor one marijuana cigarette for the price of $1.00?

We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. § 12–120.24. For the reasons that follow, we conclude that defendant's sentence does not constitute cruel and unusual punishment under the facts of this case.

FACTS AND PROCEDURAL BACKGROUND

In late September 1987 the victim, a 14–year–old friend of defendant's younger brother, broke into a lawyer's office and stole, among other things, a Smith & Wesson .357 magnum pistol valued at $350.00. A few weeks later, the victim told defendant, who was then 21 years old, that he had a stolen gun he wanted defendant to sell for him. Defendant took the gun and promised to give the victim money or drugs for it, but told the victim the gun "was very hot and that he had to keep a low profile on it."

During the time period before and after the burglary, the victim twice obtained marijuana from defendant, purchasing one marijuana cigarette for $1.00 each time. Once defendant actually handed the marijuana to the victim in exchange for money; the other time, the victim purchased the drug through defendant's younger brother, who had obtained it from defendant. After the sale that involved defendant personally, defendant smoked the marijuana with his brother and the victim in defendant's yard. The victim had never smoked marijuana in the past, and the experience made him feel dizzy.

In early October the victim spoke to investigating police officers and admitted to the law office burglary, that he had taken

the gun from that office, and that he had committed 3 other burglaries. He also told the police he had given the gun to defendant to sell for him, and that defendant had sold him marijuana. As a result of that investigation, defendant was indicted on 7 counts, including 4 counts of burglary and one count of conspiracy to commit burglary that were later dismissed, as well as the present counts of trafficking in stolen property and sale of marijuana to a minor under 15. The state filed an allegation that defendant had one prior felony conviction for theft.

At trial, the victim testified that defendant had offered to sell the stolen gun and had twice sold him marijuana. Defendant denied that these incidents had ever occurred, but admitted his prior felony conviction for theft. Defendant's younger brother, who was 15 at the time of these incidents, testified that the victim had told him about stealing the gun from a law office, but that he was not present when the victim asked defendant to sell the pistol. Defendant's brother also denied that the incidents involving the marijuana had occurred, although he admitted on cross-examination that he once smoked marijuana with the victim in defendant's yard and that defendant was present and saw them. He also testified that his brother had supplied him with marijuana in the past but had not done so since the burglary.

The investigating officer testified that the victim had cooperated with police throughout the investigation of these incidents, had received no promises in return for the information he gave them about defendant, and had been charged with and pleaded guilty in juvenile court to several counts involving 6 burglaries, as a result of the information he provided.

The jury found defendant guilty of trafficking in stolen property and sale of marijuana to a minor under 15 years old, both class 2 felonies. After the verdict, defendant admitted to his prior conviction after the trial court advised him of the rights he was waiving and the consequences of his admission. The court continued the sentencing hearing to allow time for preparation of a presentence report. Defendant did not request a mitigation hearing. At sentencing, the court imposed *consecutive* aggravated maximum terms of 21 years for trafficking in stolen property and 25 years for transferring marijuana to a minor, and ordered defendant to pay $350.00 in restitution to the owner of the gun. Defendant timely appealed, arguing, among other things, that the 25–year sentence imposed on him for selling marijuana to a minor constituted cruel and unusual punishment proscribed by the eighth and fourteenth amendments to the United States Constitution. The court of appeals affirmed defendant's convictions and sentences. *State v. Jonas*, 162 Ariz. 32, 780 P.2d 1080 (App.1989). Defendant then sought review in this court.

DISCUSSION

1. *Defendant's Sentence*

Defendant challenges the 25–year maximum sentence he received for his conviction of transfer of marijuana to a minor under the age of 15, in violation of A.R.S. § 13–3409. That statute provides, in relevant part:

> A. A person shall not knowingly:
>
> ....
>
> 2. Sell, transfer or offer to sell or transfer to a minor any substance if its possession is prohibited by ... A.R.S. § 13–3405 [which includes marijuana]....
>
> B. A person who violates a provision of this section is guilty of a class 2 felony and is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis until the sentence imposed by the court has been served, and if the minor is under fifteen years of age it is punishable pursuant to § 13–604.01, subsection A.

A.R.S. § 13–3409. Because the jury found that the minor was under the age of 15 years, the sentencing provisions of A.R.S. § 13–604.01 applied:

> A. Except as otherwise provided in this section, a person who is at least eighteen

years of age ... and who stands convicted of a dangerous crime against children in the first degree involving ... using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years....

D. The presumptive sentences prescribed in subsections A, B, and C of this section may be increased or decreased by up to five years pursuant to the provisions of § 13–702, subsections C, D and E.

The sentencing provisions of A.R.S. § 13–702 detail the factors the court shall consider in determining whether the sentence imposed shall be aggravated or mitigated. Thus, under these provisions, defendant faced a mandatory *minimum* sentence of 15 years, a *presumptive* term of 20 years, and a *maximum* sentence of 25 years, to be served without possibility of early release. Additionally, any sentence imposed had to be served consecutively to any other sentence imposed on the other count of trafficking in stolen property. *See* A.R.S. § 13–604.01(J).

The court considered the presentence report before imposing sentence. That report indicated that defendant denied committing any crime, and had told the probation officer who prepared the report, "I hope no one that got me in here is around when I get out.... they better not be around." Defendant's adult criminal record included 4 prior felonies in New York and Arizona, including convictions of violent felonies for attempted robbery and assault. Additionally, defendant had numerous misdemeanor convictions in Arizona, including several instances of furnishing alcohol to a minor, disorderly conduct, assault, DUI, and reckless driving. The presentence report evaluation concluded:

> Although only twenty-one, the defendant has accumulated a total of six felony convictions since the age of seventeen. He has exhibited a continued pattern of illegal activity and the safety of the public appears at risk when the defendant is at liberty. Attempts to change his behavior through probation (both juvenile and adult), counseling and incarceration have proven useless as the defendant appears unwilling to conform to the rules of society.
>
> Although no violence was involved in the instant offense, his record shows various violent offenses in the past.... His somewhat threatening comments at the time of the presentence investigation, coupled with his past behaviors, may require some consideration in assessing his potential for involvement in further crime. A lengthy incarceration in the Department of Corrections should help insure the safety of the community.

At sentencing, the trial judge noted that his original inclination was to seek reasons to be lenient with defendant so that he could impose a mitigated sentence, but that the presentence report had convinced him to impose the maximum sentence. As aggravating factors, the judge mentioned defendant's extensive prior criminal record "that is rare to find in somebody 21 years of age," involving both violent felonies and a history of crimes involving children. The court also pointed out that both of the crimes for which defendant was being sentenced involved assisting juveniles in criminal acts, and that defendant's record "in and of itself shows shockingly aggravating circumstances." Furthermore, the presentence report indicated that defendant had threatened to harm those involved in the prosecution of this case after his release. This factor, said the judge, "is the most shockingly and seriously important reason for putting you behind bars as long as the law will permit me to do it." The complete text of the comments by the trial court at sentencing is attached as an Appendix.

The trial court then imposed the maximum sentence of 25 years for the drug offense involving the minor, to be served consecutively to the maximum aggravated sentence of 21 years for trafficking in stolen property.[1]

1. Defendant's sentence of 21 years for trafficking in stolen property was enhanced by his prior conviction for theft. *See* A.R.S. § 13–604(B). However, defendant's sentence

2. *The Court of Appeals Opinion*

Division Two of the court of appeals held that defendant's sentence of 25 years for selling marijuana to a 14-year-old did not constitute cruel and unusual punishment in the following two-paragraph analysis:

> Certain offenses are defined by A.R.S. § 13-604.01 as "dangerous crimes against children" and the statute mandates an enhanced punishment for these offenses. Selling drugs to a minor under the age of 15 is one of these crimes. The trial court aggravated the sentence and mandated a term of 25 years to be served without possibility of parole. Appellant contends that a proportionality analysis like that conducted in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) would result in the conclusion that his sentence is unconstitutionally severe. We do not agree. Pursuant to A.R.S. § 13-604.01(A) the defendant is required to be sentenced to a presumptive term of imprisonment for 20 years and under subsection D of the same statute this sentence can be increased up to 25 years pursuant to A.R.S. § 13-702(D). The trial judge imposed the additional five-year sentence because of the defendant's lengthy criminal record. A.R.S. § 13-604.01(E) provides that a person sentenced for a dangerous crime against children in the first degree is not eligible for parole.
>
> In *State v. Crego*, 154 Ariz. 278, 742 P.2d 289 (App.1987) and *State v. Byrd*, 160 Ariz. 282, 772 P.2d 1135 (App.1988), we applied the *Solem* test to A.R.S. § 13-604.01 and determined that the sentences mandated were not unconstitutional. For the reasons set forth in the latter two cases, we affirm the sentence here.

State v. Jonas, 162 Ariz. 32, 34, 780 P.2d 1080, 1082 (App.1989).

3. *Cruel and Unusual Punishment: The Solem v. Helm Test*

The eighth amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The eighth amendment applies to the states through the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

[1] The United States Supreme Court has enunciated a 3-prong objective test to determine if a sentence is so disproportionate to the crime for which it is imposed that it constitutes cruel and unusual punishment. *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). First, we must examine the gravity of the offense and the harshness of the penalty; second, we compare sentences imposed on other criminals in the same jurisdiction for more serious crimes; and third, we compare sentences imposed in other jurisdictions for the same crime. *Solem*, 463 U.S. at 292, 103 S.Ct. at 3010. No one factor is controlling in determining proportionality, but the combination of factors makes the analysis possible. *Solem*, 463 U.S. at 291 n. 17, 103 S.Ct. at 3010 n. 17. In *Solem*, a defendant who was previously convicted of nonviolent felonies was sentenced to life imprisonment without parole for passing a fraudulent $100.00 check. The Supreme Court found, under the 3-prong analysis, that the sentence was disproportionate to the crime and violated the eighth amendment.

In this case, defendant challenges the application of the statute imposing punishment for "dangerous crimes against children," A.R.S. § 13-604.01, as applied to the facts of his case. He concedes that the statute may be validly applied to other crimes against children for other offenses, and thus does not challenge the constitutionality of the statute on its face.

for transferring marijuana to a minor was not enhanced by his prior conviction for theft because that offense was not a "predicate felony" pursuant to A.R.S. § 13-604.01(K)(2). We note that, although the trial court correctly sentenced defendant within the statutory range for a first offense under § 13-604.01, the judgment erroneously classifies the offense as "repetitive." We therefore modify the written judgment to reflect the nonrepetitive nature of defendant's conviction of transferring drugs to a minor. *See* A.R.S. § 13-4037.

We note that A.R.S. § 13–604.01 previously has withstood eighth amendment attacks in the context of crimes against children involving child molestation or sexual offenses. *See State v. Taylor*, 160 Ariz. 415, 773 P.2d 974 (1989) (aggregate sentence of 2,975 years for 85 counts of crimes against children not cruel and unusual punishment); *State v. Byrd*, 160 Ariz. 282, 772 P.2d 1135 (App.1988); *State v. Smith*, 156 Ariz. 518, 526, 753 P.2d 1174, 1182 (App. 1987); *State v. Crego*, 154 Ariz. 278, 280, 742 P.2d 289, 291 (App.1987). We must now decide whether the statute withstands eighth amendment scrutiny [2] under the particular facts of this case, involving the sale of a small quantity of marijuana to a 14-year-old child.

a. *Gravity of the Offense and Harshness of the Penalty*

[2] Under *Solem*, the gravity of the offense is determined by the type of harm threatened or inflicted and the level of defendant's culpability. 463 U.S. at 292, 103 S.Ct. at 3010. We measure the type of harm by the seriousness of the crime, whether the crime was committed against a person or property, and whether the crime was violent in nature. *Solem*, 463 U.S. at 292–93, 103 S.Ct. at 3010–11.

In this case, defendant's offense involved the sale of a prohibited drug. *See* A.R.S. § 13–3405. Drug abuse has been recognized as "one of the most serious problems confronting our society today." *National Treasury Employees Union v. Von Raab*, — U.S. —, 109 S.Ct. 1384, 1395, 103 L.Ed.2d 685 (1989).

Defendant's crime was also one defined by our legislature as a "dangerous crime against children." *See* A.R.S. § 13–604.01. In 1987 the legislature specifically added the crime of "involving or using minors in drug offenses" to the list of crimes considered dangerous when committed against children. *See* A.R.S. § 13–604.01(A), (K)(1)(m), added by Laws 1987, Ch. 307, § 4; A.R.S. § 13–3409, added by Laws 1987, Ch. 307, § 24. This court long ago recognized the particular seriousness of crimes that involve children and drugs:

> It is true that the sentence imposed upon the defendant is severe. However, the social, economic, and moral fabric of the state is constantly threatened by those unscrupulous individuals who turn minors into spineless creatures craving for narcotics.

State v. Valenzuela, 101 Ariz. 230, 233, 418 P.2d 386, 389 (1966). Other courts have also recognized that a drug sale to a child is "significantly more culpable" than a sale to an adult. *See In re Flores*, 58 Cal.App.3d 222, 225, 128 Cal.Rptr. 847, 849 (1976); *People v. Carbonie*, 48 Cal.App.3d 679, 686, 121 Cal.Rptr. 831, 834 (1975) (higher penalties justified "to discourage adults from apprenticing minors in the drug trade"). In a similar case, the California court of appeal reasoned:

> Here, the mandatory minimum term is but a means to the ultimate end of protecting children from those adults who might otherwise be tempted to involve them in drug traffic. Indeed, the need for such a sanction seems particularly acute when we consider the fact that society's policy of leniency toward minors has the unfortunate side effect of making them ideal retail outlets in a narcotics distribution scheme.

Carbonie, 48 Cal.App.3d at 686–87, 121 Cal.Rptr. at 834–35. We also agree with that court that "[i]n the hierarchy of baseness of crimes involving drug traffic, the sale or furnishing of drugs to minors ranks at the very top." *In re Flores*, 58 Cal. App.3d at 226, 128 Cal.Rptr. at 850.

We disagree with the dissent that this victim "was not an innocent corrupted by defendant." The record clearly discloses that this was the victim's first experience with drugs; he testified he had never been around or smoked marijuana in the past, and that the experience "got me dizzy." He also testified that defendant offered

2. Because defendant has not argued on review that the protection against cruel and unusual punishment would be any greater under the Arizona Constitution analog to the eighth amendment of the federal Constitution, *see* Ariz. Const. art. 2, § 15, we do not address that issue. Our review is limited to defendant's eighth amendment claim.

him marijuana for the stolen gun. Furthermore, we do not consider the fact that the victim had a juvenile record for non-drug related offenses to be either relevant or mitigating in our consideration of the seriousness of a crime that involves the introduction of drugs into the life of a 14-year-old, as does the dissent.

Additionally, defendant's conduct was an intentional offense against a person, not property, which makes it a more serious crime. Although the offense appears on its face to be nonviolent, "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel v. Estelle*, 445 U.S. 263, 275, 100 S.Ct. 1133, 1140, 63 L.Ed.2d 382 (1980). Indeed, other courts have rejected the argument that drug-dealing can be compared to the nonviolent crime of passing bad checks involved in *Solem v. Helm*:

> Drug dealing cannot be said to be as nonviolent as writing a bad check. Even ignoring the violence typically associated with narcotics operations, heroin dealing can readily lead to violence, theft, robbery, or the like on the part of a buyer to support his habit.

United States v. Ortiz, 742 F.2d 712, 715 (2d Cir.1984); *see also United States v. Klein*, 860 F.2d 1489, 1497 (9th Cir.1988). In this case, the record indicates that defendant implicitly encouraged the juvenile victim's drug use and burglary attempts by promising him more drugs in lieu of money for the sale of the stolen gun. Under these facts, we will not ignore the potential connection between drug use and violence by classifying this a "nonviolent" crime to lessen its gravity within the context of the *Solem* analysis. *See In re Flores*, 58 Cal. App.3d at 228, 128 Cal.Rptr. at 851 (sale of heroin to a minor cannot be classified as nonviolent because "it possesses the potential to cause the commission of innumerable acts of violence....").

Defendant concedes in his petition for review that "sale of marijuana to a minor is a serious act of misconduct," but argues that the seriousness of that crime does not justify a sentence of 25 years without possibility of parole when the sale involved only one marijuana cigarette. However, it is not the function of this court to engage in determining what minimum amount of marijuana need be involved in a "serious" offense; that line-drawing function is properly one for the legislature. *See Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (fact that defendant stole only a "small" amount of money did not make his sentence disproportionate). The Arizona legislature, by enacting A.R.S. § 13-3409, has already determined that sale of *any* amount of marijuana to a minor under 15 years old is a serious crime. If this statute "makes a mockery of the law and creates an aura of disrespect," as the dissent contends, it is for the legislature, and not this court, to correct.

After weighing the seriousness of the crime of transferring an illegal drug to a minor under 15 years old, we do not consider a 25-year prison sentence to be excessively harsh. We note that other sentences of the same or greater duration have been upheld for similar crimes. *See, e.g., Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (40-year sentence for possession of less than 9 ounces of marijuana was not cruel and unusual punishment); *Pickard v. State*, 94 Nev. 681, 585 P.2d 1342 (1978) (mandatory life sentence for selling less than one ounce of marijuana to a minor was not cruel and unusual punishment).

[3] However, defendant also argues that the defect in application of the sentencing provisions of A.R.S. § 13-604.01 to the circumstances of his conviction is not merely the mandatory minimum term of imprisonment; he notes that he is not afforded any possibility of parole, and that the statute robs the court of any discretion to consider the individual facts of a particular case and the defendant's personal culpability. The state acknowledges that the length of defendant's sentence in this case was the result of "several analytically separate factors," including: (1) the presumptive term of 20 years required by A.R.S. § 13-604.01(A); (2) the additional 5 years

added because of aggravating factors pursuant to A.R.S. § 13–702; (3) the unavailability of parole under § 13–604.01(E); and (4) the mandatory consecutive terms imposed by A.R.S. § 13–604.01(J). Thus, in this case the severity of the sentence involves more than just the imposition of a prison term of 25 years for the crime.

We have previously held that the mandatory nature of a sentence does not render it disproportionate. *State v. Day*, 148 Ariz. 490, 715 P.2d 743 (1986). In this case, the trial court retained discretion to consider defendant's personal circumstances in mitigation and aggravation and sentenced him within the statutory range of 15 to 25 years for this offense. *See* A.R.S. §§ 13–604.01(D), –702. This was not a case in which the court felt constrained by the mandatory minimum sentence to give defendant a harsher sentence than he deserved; rather, here the court used its statutory discretion to give defendant the *maximum* penalty allowed.

[4] We also do not find the consecutive nature of the sentences to be a factor rendering defendant's second sentence disproportionate to his crime. A defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts. *State v. Wesley*, 131 Ariz. 246, 640 P.2d 177 (1982); *State v. Young*, 106 Ariz. 589, 480 P.2d 345 (1971). We therefore do not consider the fact that defendant must serve one sentence for a separate crime before beginning the other as a factor that disproportionately lengthens the second sentence.

Whether the sentence precludes the possibility of parole, however, is a factor in determining its severity. *Solem*, 463 U.S. at 297, 103 S.Ct. at 3013. The absence of parole, in itself, however, does not make a sentence disproportionate. *See Solem*, 463 U.S. at 297 n. 24, 103 S.Ct. at 3013 n. 24 ("We raise no question as to the general validity of sentences without possibility of parole"). In this case, the absence of parole availability merely requires us to realistically consider that defendant will serve the entire 25–year term as punishment for his crime instead of a lesser sentence.

Under the facts of this case, we do not find this 25–year sentence excessive. The record indicates defendant's lengthy prior criminal record, including prior crimes involving children as well as violent offenses, his inability to benefit from alternatives to incarceration, his threats to harm those involved in the prosecution of his case upon his release, and his unwillingness to cooperate with the criminal justice system. Under these circumstances, and considering the seriousness of the crime, we do not find this penalty to be disproportionately harsh under the first prong of the *Solem* test.

b. Sentences Imposed for Other Crimes in Arizona

The second prong of *Solem* involves the inquiry whether criminals in Arizona who commit more serious crimes receive less severe sentences than this defendant. 463 U.S. at 292, 103 S.Ct. at 3010. The legislature has determined that dangerous crimes against children are among the most serious crimes possible. In applying this prong, the court of appeals has often compared other dangerous crimes against children to conclude that a sentence "is not disproportionate when compared with other sentences imposed upon similarly situated defendants in Arizona," because "[a]ll persons convicted of offenses against children such as child molestation, aggravated assault, sexual exploitation, child abuse, or kidnapping, are subjected to the penalties which were imposed upon appellant." *State v. Crego*, 154 Ariz. at 280, 742 P.2d at 291; *see also State v. Smith*, 156 Ariz. at 526, 753 P.2d at 1182 ("all similarly situated defendants who commit multiple dangerous crimes against children fall within the same range of sentencing, and all must serve their sentences in consecutive sequence"). However, we believe the inquiry must be broader than simply comparing all crimes involving minors under 15 years old punishable under the statute that is presently challenged as imposing cruel and unusual punishment. To the extent that *Crego* and *Smith* limited their inquiry to crimes punishable under A.R.S.

§ 13–604.01, we disapprove of their analyses.

[5] In comparing the punishments for more serious crimes, we consider what the punishment would be for a criminal with defendant's prior criminal history. Although defendant's sentence for transferring marijuana to a minor could not be enhanced by his prior convictions because they did not constitute predicate offenses, his prior felony convictions could enhance his sentence for other serious crimes. *See generally* A.R.S. § 13–604. For example, if this defendant were charged with sale of marijuana in a quantity much larger than that involved here, he would be convicted of a class 2 felony; if the state alleged his prior adult felony convictions, he could be sentenced to a maximum term of 28 years in prison, ineligible for release until two-thirds of the sentence was served. *See* A.R.S. § 13–3405(B)(9), –(C); A.R.S. §§ 13–701, –702, –604(B). Other class 2 felonies have similarly long sentences for recidivists when the court finds aggravating circumstances as extensive as those shown by defendant's record.[3] For example, the following serious crimes have maximum sentences ranging from 28 years for a nondangerous offense to 35 years for a dangerous offense, pursuant to A.R.S. § 13–604(G): sexual assault, A.R.S. § 13–1406; armed robbery, A.R.S. § 13–1904; and kidnapping, A.R.S. § 13–1304. *See State v. Byrd*, 160 Ariz. 282, 772 P.2d 1135 (App.1988). We thus do not find defendant's sentence of 25 years without possibility of early release to be disproportionate to the punishments Arizona imposes for more serious crimes, under the second prong of the *Solem* test.

c. *Sentences for the Same Crime in Other Jurisdictions*

The third prong of the *Solem* test involves a comparison of the punishment im-

3. The dissent misunderstands our use of defendant's prior criminal history. Although, as we have previously pointed out, defendant's prior felonies were not used on this count to enhance the range of penalties, they could have been used to enhance the potential sentences he would have faced for this crime in other jurisdictions, or for more serious felonies in this jurisdiction. We therefore compare what a defendant with similar prior felony convictions would face for this same crime in other states. We have not considered defendant's other juvenile crimes as part of his recidivist record, although those crimes properly could be considered in aggravation, not enhancement.

In this case, the record clearly shows that defendant was an adult recidivist. At trial, he admitted conviction as an adult in Cochise County Superior Court Cause 11862, on April 30, 1986, for theft, a class 5 felony, less than a month before his 20th birthday. This conviction is recidivist pursuant to A.R.S. § 13–604(B). His other adult conviction as a result of this trial, for trafficking in stolen property, a class 2 felony, is also recidivist pursuant to A.R.S. § 13–604(H), and the offense occurred after defendant's 21st birthday. Defendant's presentence report indicates that his robbery and assault convictions in New York were considered "adult" convictions, for the following reasons:

> Although sentenced as a "youthful offender" in the state of New York, an individual is treated as an adult at the age of seventeen in that state. According to the New York authorities, the youthful offender program provides offenders up to age nineteen to be placed on the program. If an individual successfully completes a probationary period, the charge is expunged from his record. New York authorities indicate that after the defendant served a year in their jail facility, he was ordered to return to Arizona and supervision was transferred to the State of Arizona as well.
>
> According to [the Arizona probation officer] who handled the case, the defendant was uncooperative in regards to reporting and other requirements of probation and [the officer] eventually closed the case out and returned it to New York....

We therefore consider this defendant's record to show 4 adult felony convictions. However, even if we were to disregard the New York felony convictions as recidivist, this defendant's record clearly shows two adult Arizona prior felonies. The dissent fails to take into consideration any of these prior convictions or the other aggravating factors on this record in its comparison of sentences for this crime in other jurisdictions or in comparing sentences for other, more serious crimes in this jurisdiction. Indeed, the dissent prefaces its comparison of potential sentences for other crimes with the disclaimer, "[a]bsent aggravating circumstances" although this record is replete with aggravating circumstances and a record as a recidivist. Although it is true that a first felony offender without defendant's record might have faced lesser sentences for this crime in other jurisdictions and for more serious crimes in this jurisdiction, a recidivist with a record like defendant would face the maximum sentences we compare here.

posed for the same crime in other jurisdictions.

The state has included in its answering brief a lengthy matrix of the sentencing provisions for sale of marijuana in the other 49 states and the District of Columbia. A review of that information reveals that 35 of the other 50 jurisdictions listed also have more stringent penalties for sale of marijuana to a minor than sale to an adult. Additionally, at least 22 jurisdictions could have sentenced a defendant with 4 prior felony convictions and defendant's background to a maximum term of 25 years or more for the same crime, some of them up to life sentences.[4]

However, this comparison again is made more difficult in our analysis by the fact that A.R.S. § 13–604.01 precludes the possibility of parole during the entire term of the sentence. Thus, as a practical matter, defendant's 25–year sentence is among the harshest in the nation, because he will not be eligible for release until every day of his sentence is served.

We note, however, that this factor alone will not cause a sentence to be considered cruel and unusual under the *Solem* test. A state's deviation from the punishment chosen by a majority of other states does not necessarily result in a violation of the eighth amendment. *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984). Providing parole is an act of "executive grace" that is not within the "normal expectation" of those that traffic in narcotics, unlike the defendant in *Solem*, who may have had a "normal expectation" of parole for passing a bad check. *United States v. Klein*, 860 F.2d 1489, 1497–98 (9th Cir.1988). The nonexistence of parole provisions in mandatory minimum sentences historically has been upheld as constitutional. *See Schick v. Reed*, 419 U.S. 256, 267, 95 S.Ct. 379, 385, 42 L.Ed.2d 430 (1974); *United States v. Valenzuela*, 646 F.2d 352, 354 (9th Cir. 1980); *Moore v. Cowan*, 560 F.2d 1298, 1302–03 (6th Cir.1977); *United States v. Bergdoll*, 412 F.Supp. 1308, 1319 (D.Del. 1976). We therefore do not find defendant's sentence to be cruel and unusual simply because it does not provide the possibility of parole.[5]

The Ninth Circuit recently upheld another Arizona sentencing scheme against an eighth amendment attack, even though it resulted in the harshest penalties for recidivists in the nation:

> The fact that one state has the distinction of setting the most stringent prison sentence for a particular crime does not automatically render such punishment "grossly disproportionate" to the offense or to the punishment dictated by other states. *Rummel*, 445 U.S. at 281 [100 S.Ct. at 1143]. As the Supreme Court has stated, "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some state will always bear the distinction of treating particular offenders more severely than

4. These are the maximum terms in those states: Alabama, with 3 priors, life without parole, Ala. Code § 20–2–73; Colorado, with 3 priors, natural life, Colo.Rev.Stat. §§ 16–13–101, 18–18–106; Delaware, with 3 priors, up to life, Del.Code Ann. tit. 11 § 4214; District of Columbia, with 2 priors, natural life, D.C.Code Ann. § 22–104(a); Florida, with 3 priors, 30 years, Fla.Stat. § 893.13(1)(c); Idaho, with 2 priors, life, Idaho Code § 19–2514; Indiana, 2 to 4 years, with a prior, add 30 years, Ind.Code Ann. §§ 35–48–4–10, 35–50–2–7; Kansas, with 2 priors, 30 years, Kan.Stat.Ann. § 21–4504; Louisiana, 60 years; with 2 priors, life without parole, La.Rev.Stat. Ann. §§ 40:981(C), 15:529.1; Mississippi, if one of two priors is violent, life without parole, Miss.Code Ann. § 99–19–83; Missouri, life, Mo. Rev.Stat. §§ 195.017, 195.200(1)(4); Montana, life, Mont.Code Ann. § 45–9–101(5)(d); Nebraska, with priors, 60 years, Neb.Rev.Stat. § 29–2221; Nevada, second conviction of sale to a minor, life, Nev.Rev.Stat. § 453.334; New York, with 2 priors, life, N.Y.Penal Law §§ 221.50, 70.00; Rhode Island, with 2 priors, 25 years, R.I.Gen.Laws § 12–19–21; Texas, 99 years or life, Tex.Civil Code Ann. § 4.01(b); Utah, life, Utah Code Ann. § 58–37–8, § 76–3–203; Vermont, 25 years, Vt.Stat.Ann. tit. 18 § 4224(h); with 3 priors, natural life, Vt.Stat.Ann. tit. 13 § 11; Virginia, 50 years, Va.Code Ann. § 18.2–255(A); West Virginia, with 2 priors, life, W.Va.Code § 61–11–18; and Wyoming, with 3 priors, life, Wyo.Stat. § 6–10–201.

5. We also disagree with the dissent that the cost of defendant's incarceration as a result of the nonavailability of parole has any relevance in an eighth amendment analysis.

any other state." *Id.* at 282, 100 S.Ct. at 1143.

Cocio v. Bramlett, 872 F.2d 889, 897 (9th Cir.1989). We similarly find that defendant's 25–year sentence without possibility of early release, for transferring marijuana to minors, although harsh, is not cruel and unusual as violative of the eighth amendment under the third prong of the *Solem* test.

CONCLUSION

We hold that defendant's 25–year sentence for the sale of one marijuana cigarette to a 14–year–old, to be served without parole and consecutive to his 21–year sentence for trafficking in stolen property, is not disproportionate to his crime, and thus does not constitute cruel and unusual punishment under the facts of this case.[6] His sentence pursuant to A.R.S. § 13–604.01 does not violate the eighth amendment; it is therefore affirmed as modified.

GORDON, C.J., and CAMERON and MOELLER, JJ., concur

FELDMAN, Vice Chief Justice, dissenting.

I must dissent because I believe the sentence imposed is so disproportionate to the facts that it violates the eighth amendment. In finding the sentence proportionate, the majority misapprehends *Solem*'s analytical framework.

A. The Gravity of the Offense vs. the Harshness of the Penalty

Just today this court recognizes that we must measure the gravity of the offense by the actual facts of the case. *See State v. Bartlett*, — Ariz. —, —, 792 P.2d 692, 697 (1990). The court states that "we must examine the type of harm threatened or inflicted and the level of defendant's culpability, measured by the seriousness of the crime, against whom it was committed, and its level of violence." *Id.* The majority opinion in this case fails to meet these criteria.

1. *Seriousness of the Offense*

All but two of the cases the majority cites to prove this crime is serious involved the use of a minor in drug trafficking or the sale or use of heroin, not marijuana.[7] How can the court evaluate the specific facts of this case when it uses authority that deals with offenses that are factually different and more grave?

The majority discusses two cases, *Pickard v. State*, 94 Nev. 681, 585 P.2d 1342 (1978), and *Hutto v. Davis*, 454 U.S. 370, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982), that do involve marijuana use. Both were decided before *Solem* and both are readily distinguishable. *Pickard* dealt with a statute that mandated life imprisonment but allowed parole after seven years. Nonetheless, the court stated:

> Although it is distinctly arguable that appellant's sentence in this case is "grossly out of proportion to the severity of the crime," this court would feel unjustified in so concluding, upon the record before us.
>
> Accordingly, although we affirm appellant's conviction, we have ordered appel-

6. The dissent suggests that it would "reduce" defendant's sentence to a more proportionate one pursuant to this court's authority to reduce an otherwise legal, but excessive, sentence. *See* A.R.S. § 13–4037. However, the dissent does not explain exactly what sentence it considers to be proportionate in this case. Alternatively, if we utilized the remedy we today chose in *Bartlett*, we would have to hold this sentencing statute unconstitutional as applied to defendant, and remand for defendant's resentencing as a class 2 felon outside the dangerous crimes against children statute. *See State v. Bartlett*, — Ariz. —, —, 792 P.2d 692, 704 (1990); A.R.S. § 13–3409. However, the state could then seek enhancement for defendant's two prior Arizona felonies pursuant to A.R.S. § 13–604, placing defendant as a third offender into a sentencing range of from 14 to 28 years without possibility of early release for this offense for which he was already sentenced in a 15 to 25 year range as a nonrecidivist.

7. *See, e.g., State v. Valenzuela*, 101 Ariz. 230, 418 P.2d 386 (1966) (heroin); *In re Flores*, 58 Cal.App.3d 222, 128 Cal.Rptr. 847 (1976) (sale of heroin to a minor with intent to cause addiction, with one prior felony conviction alleged); *People v. Carbonie*, 48 Cal.App.3d 679, 121 Cal.Rptr. 831 (1975) (apprenticing minor in drug trade).

lant's case placed on the agenda for consideration of the Nevada Board of Pardons.

585 P.2d at 1344. *Pickard* thus provides no support for the court's holding that the eighth amendment permits a defendant who sold one marijuana cigarette to be imprisoned for twenty-five years, to be served day-by-day consecutive to any other sentence imposed.

Hutto dealt with a dealer, a defendant who had possession of nine ounces of marijuana with intent to distribute. Furthermore, *Solem* rejected *Hutto*'s basic premise that the eighth amendment does not apply to prison terms. *See* 463 U.S. at 288, 103 S.Ct. at 3009. *Hutto* provides no authority for finding the sentence in this case proportionate.

The majority also incorrectly includes defendant's previous record when analyzing the gravity of the offense. The focus should be "on the principal felony—the felony that triggers the [sentence]—since [defendant] already has paid the penalty for each of his prior offenses." *Solem*, 463 U.S. at 296 n. 21, 103 S.Ct. at 3013 n. 21. Defendant paid his penalty for being a repetitive offender on the "fencing" charge. He does not meet the statutory definition of a repetitive offender (A.R.S. § 13–604) on the marijuana charge, and his record should not be used to determine the seriousness of the offense.[8]

2. *Harm to the Victim*

While sale of marijuana to a minor is a serious offense, the young "victim" in this case was not an innocent corrupted by defendant. As in *Bartlett*, the victim was close to the maturity line the legislature has drawn for imposing less severe sentences. He was not only a willing participant, but admitted that he requested the marijuana.[9] Moreover, he was an accomplished thief who admitted to twenty-one counts of crime involving six burglaries, including the theft of the gun he asked defendant to "fence" for him.

The record does not even hint that defendant involved the minor in "drug traffic," at ———, 792 P.2d at 710 (citing *People v. Carbonie*, 48 Cal.App.3d 679, 121 Cal.Rptr. 831, 834–835 (1975)), or in "heroin dealing," at ——, 792 P.2d at 711 (citing *United States v. Ortiz*, 742 F.2d 712 (2d Cir.1984)). The record does not indicate that defendant in any way encouraged the juvenile in drug use or burglary. A realistic view of harm to the victim does not add to defendant's culpability in this case. *See Bartlett*, — Ariz. at ——, 792 P.2d at 698.

3. *Violent Nature of Offense*

The majority attempts to shoehorn the facts of this case into its view of the gravity of the offense by comparing the sale of one marijuana cigarette to a violent crime. The majority states that "we will not ignore the potential connection between drug use and violence by classifying this a 'non-violent' crime to lessen its gravity within the context of the *Solem* analysis." At ——, 792 P.2d at 711. Presumably, somehow, the crime is thus to be classified as "violent." The majority does not explain how.

B. Sentences Imposed for Other Crimes in Arizona

The unconstitutionality of this sentence is apparent when we look at other sentences required by Arizona criminal law.

8. The trial judge was obviously confused as to the effect of defendant's priors as he erroneously classified the marijuana offense as repetitive when he imposed the twenty-five year sentence. *See* at —— n. 1, 792 P.2d at 708–709 n. 1. Furthermore, the state may have been unable to allege defendant's "4 prior adult felony convictions" (at ——, 792 P.2d at 713) under a different statute because defendant was sentenced for three of them in New York as a "youthful offender" and the record is not clear as to whether these offenses have been expunged.

9. The victim testified as follows:

Q. As to these purchases of cigarettes, who suggested you buy the cigarettes?
A. I did.
Q. You actually asked to buy them?
A. Yes, I did.
Q. What was done with the cigarettes?
A. We smoked them.

Reporter's Transcript, Feb. 10, 1988, at 86.

Defendant could be sentenced to the same maximum twenty-five year term if he had been convicted of committing the most reprehensible sexual crimes with children, such as sexually assaulting a child or using the child as a prostitute. *See* A.R.S. § 13–604.01(A); *see also State v. Benefield*, No. 2–CA–CR–89–0259, — Ariz. —, — P.2d — (Ariz.Ct.App.1989) (*rev. denied*, Mar. 6, 1990) (twenty-year sentences affirmed for acts of anal and vaginal rape of three-year-old girl). As the court stated in *Bartlett*, more serious crimes than this, "such as aggravated assault, child molestation, child abuse or kidnapping, are subject to a lesser minimum sentence...." — Ariz. at —, 792 P.2d at 699.

If defendant had been convicted of second degree murder of this child "victim," the maximum sentence he could receive would be twenty-five years. Absent aggravating circumstances, even if defendant had killed an adult in a premeditated, first degree murder, he would have been eligible for parole in twenty-five years. A.R.S. § 13–703(A); *see also Bartlett*, — Ariz. at —, 792 P.2d at 699–700 (discussing incongruity of sentencing for potentially more serious crimes). If he had been a killer convicted of second degree murder of an adult, he would receive at most an aggravated sentence of twenty years. A.R.S. § 13–710. Only upon his commission of another second degree murder would defendant be subject to the same sentencing range (fifteen to twenty-five years) as he is today for the sale of one marijuana cigarette. *Id.* If he committed a third, second degree murder, he would receive life, but still would be eligible for parole in twenty-five years. A.R.S. § 13–604(N).

The same disproportionality is apparent when we examine sentences for drug offenses. Even the most serious drug offenders are treated no more harshly than this defendant. For instance, life imprisonment was imposed on a cocaine dealer arrested while on probation for a prior drug offense. *See State v. Waits*, 163 Ariz. 216, 786 P.2d 1067 (Ct.App.1989) (*rev. denied*, Mar. 6, 1990). The court of appeals, in affirming the sentence, was careful to point out that defendant was not merely convicted of the sale of a narcotic drug, but that the state had alleged and proved defendant had two prior felonies and that he was convicted pursuant to A.R.S. § 13–604.02(A) as a defendant who had committed a class 2 felony while on probation. *Id.* The cocaine dealer will be eligible for parole in twenty-five years.

Thus, even a cursory glance at Arizona law makes it apparent that defendant's punishment is grossly disproportionate when compared to punishment for other, much more serious crimes in this jurisdiction.

C. Sentences in Other Jurisdictions

In its analysis of *Solem*'s third prong, the majority concedes that a twenty-five year consecutive sentence without possibility of parole is disproportionate when compared to that which could have been imposed in any other jurisdiction. It even acknowledges that the sentence is "among the harshest in the nation." At —, 792 P.2d at 714. Actually, it *is* the harshest. Arizona is the *only* state that would or could incarcerate a first-time seller of one marijuana cigarette to twenty-five years in prison without parole to be served consecutively to any other sentence imposed. The majority consoles itself by reflecting that some state must have the distinction of being the most severe. At —, 792 P.2d at 714; *cf. Bartlett*, — Ariz. at —, 792 P.2d at 703. The truth is that compared to other states, this sentence is constitutionally disproportionate.

The sentence for the marijuana offense is made even more disproportionate because it is imposed consecutively. The majority claims we are *not* to "consider the fact that defendant must serve one sentence for a separate crime before beginning the other as a factor that disproportionately lengthens the second sentence." At —, 792 P.2d at 712. We should not ignore the consecutive nature of the sentence because it is the sentencing statute itself that mandates that "[t]he sentence imposed ... shall be consecutive to any other sentence imposed on the person at

any time." *See* A.R.S. § 13–604.01(J). Surely when a sentence must be served without parole and consecutively to any other, we must consider that factor on the question of severity.

CONCLUSION

I do not underestimate the problems drug use creates in this state. In enacting A.R.S. § 13–604.01(K)(1)(m), the legislature has attempted to protect our children from the malevolent influence of those who would involve them in drug trafficking or use. There are undoubtedly many cases in which the aggravated penalty the legislature has prescribed will be properly imposed. This is not one of them.

The bottom line is simply this: for selling one marijuana cigarette for one dollar to a young but experienced burglar seeking to sell a stolen gun, this defendant must serve twenty-five years in state prison without possibility of parole, consecutive to the sentence for attempted sale of the gun stolen by the burglar, for a total of forty-six years. Defendant is treated more severely than the law would treat a killer, a kidnapper, a sexual abuser, or an anal rapist.

The majority spends many pages attempting to rationalize this result and somehow concludes that it is constitutionally proportionate, even though it could not happen in any other state in the union. This court has turned Arizona into a minority of one.

As far as defendant is concerned, the sentence is so harsh that it is manifestly unjust. Our pity, however, must be reserved for the taxpayers of this state. The court has sentenced them to pay over $1.5 million [10] to imprison this defendant for forty-six years.[11]

The punishment imposed on defendant was the maximum possible under the statute. Given its duration, the lack of parole possibility, and consecutive imposition of the twenty-five year sentencing, bringing the total to forty-six years, this sentence is disproportionate and so severe that it shocks the conscience. This court should therefore reduce the punishment under A.R.S. § 13–4037(B) to one that is not unconstitutionally severe. *See, e.g., Hamilton v. Municipal Court*, 163 Ariz. 374, 788 P.2d 107 (Ct.App.1989) (*rev. denied*, Mar. 27, 1990) (reducing a sentence by vacating the five-day jail term imposed on lawyer).

If this court cannot or does not use the power the legislature has given it under A.R.S. § 13–4037(B), then it must find this disproportionately excessive sentence cruel and unusual under the eighth amendment. Excessive sentences such as the one imposed in this case do not lead to observance of the law. Instead, they make a mockery of the law and create an aura of disrespect.

The majority suggests that the problem is one the legislature should correct. At ——, 792 P.2d at 711. It is wrong. By enacting A.R.S. § 13–4037(B), the legislature of this state gave this court the power and responsibility to correct unjust sentences. The court should exercise that responsibility. By enacting the eighth amendment, the founders of this country created restrictions on legislative action. If courts do not enforce those restrictions, they are meaningless.

Appendix A

Transcript of Sentencing Hearing, Maricopa County Superior Court, March 7, 1988

THE COURT: I was concerned about the fact that the gun that was the subject of the trafficking in stolen property was not one you stole but one somebody else stole, and it was the witness against you at the trial who was, in fact, responsible for the theft and burglary of that gun. I was also mindful of the fact that

10. Calculation based on actual figures from Department of Corrections Annual Report for Fiscal Years 1984–1989. Projected costs calculated using a linear forecast methodology by the Research Department of the Administrative Office of the Courts, February, 1990.

11. The majority accuses me of arguing that the cost of incarceration is somehow relevant to an analysis under *Solem v. Helm*. Of course, I do not. I consider it relevant only to the use of common sense.

Appendix A—Continued

the sale of marijuana in this case was one, perhaps two joints; that it is not a tremendous amount of marijuana involved. So it was with some predisposition toward lenience that I picked this report up and began reading. And I don't think that there is a page in this report, Mr. Jonas, that doesn't tell me that that thinking is just dead wrong. The record section of this report ... the recitation of criminal offenses ... is rare to find in somebody 21 years of age. It is more often the case that I see people 40 or 50 years old before me that sometimes demonstrate the kind of criminal involvement that you have. And the list, ironically, begins in another state in 1983 and reflects robbery, a violent felony after a violent felony burglary, so the very first offense listed in this report as a youthful offender was propensity for violence and a propensity for disregarding the property rights and safety of other human beings.

The list goes on to show that on more than one occasion, a number of occasions, the criminal offenses that you have been involved in have also involved juveniles. There is minor consumption of alcohol. There is furnishing alcohol to a minor. And in this case itself, the record shows that the weapon that you stole involved minors and that the drug substance that was transferred involved minors, your brother and another. The criminal record also shows that you didn't have a lot of respect for the system, failing to appear in court when you are ordered to do so. Contempt of court for failure to pay fines, revocation of probation for a felony for which you were originally granted probation, threatening and intimidating other people, under-age consumption, and a DUI. The record in and of itself shows shockingly aggravating circumstances.

The circumstances of this offense, just in that they involve juveniles and were separate and distinct from each other, is a sufficient aggravating circumstance and I suppose more than any other shocking aggravating circumstance reflected by this presentence report is ... where I read that during the presentence interview, and I am quoting: He indicated that upon his release he would like to go to Russia as he was not happy with conviction on the instant offense. He also warned, "I hope no one that got me in here is around when I get out. They had better not be around."

That tells me that the people responsible for your being before the court for sentencing today, including perhaps the witness who testified against you, the prosecutor who was responsible for the conviction in this case, perhaps the court itself, may be in actual physical danger when and if you get out of prison. That to me is the most shockingly and seriously important reason for putting you behind bars for as long as the law will permit me to do it.

Supreme Court, U.S.
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NO. 90-473

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF ARIZONA,

Petitioner,

-vs-

JOSEPH BARTLETT, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

RONALD L. CRISMON
Acting Chief Counsel
Criminal Division

GEORGIA BUTCHER ELLEXSON*
Assistant Chief Counsel
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686
(State Bar No. 003785)

Attorneys for PETITIONER

*Counsel of Record

QUESTION PRESENTED

Should the instant case be held pending resolution of Harmelin v. Michigan, when both cases call into question the validity of Solem v. Helm in reviewing mandatory sentences of imprisonment and, both cases assert that application of Solem's criteria violates notions of federalism?

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ARGUMENT

THE INSTANT CASE SHOULD BE HELD PENDING RESOLUTION OF HARMELIN V. MICHIGAN BECAUSE BOTH CASES CALL INTO QUESTION THE VALIDITY OF SOLEM V. HELM IN REVIEWING MANDATORY SENTENCES OF IMPRISONMENT AND, BOTH CASES ASSERT THAT APPLICATION OF SOLEM'S CRITERIA VIOLATES NOTIONS OF FEDERALISM.

This Court has granted the petition for certiorari in Ronald Allen Harmelin v. State of Michigan, ___ U.S. ___, 110 S. Ct. 2559, 109 L. Ed. 2d 742 (May 29, 1990), to address the question whether a mandatory sentence of life imprisonment without possibility of parole for possession of over 650 grams of cocaine violates the cruel and unusual punishment clause of the Eighth Amendment. In Harmelin, this Court has been asked to re-examine or overrule Solem v. Helm, 463 U.S. 277 (1983). Since petitioner, the State of Arizona, is also requesting that this Court

re-examine the application of Solem v. Helm to sentences of mandatory imprisonment, petitioner requests that the instant case be held for resolution in light of Harmelin.

This request is appropriate notwithstanding respondent Bartlett's claim (at page 62 of the brief in opposition to the petition) that the offenses and facts of the two cases are "totally different" from each other. Both cases are based on state courts' analyses of the cruel and unusual punishment provision of the Eighth Amendment to statutes involving mandatory sentences. Both cases suggest that the Solem doctrine has been misinterpreted and misused as a means of reviewing judicially unpopular state laws and erroneously setting aside mandatory sentences.

In Harmelin, the state court considered a mandatory life sentence without possibility of parole for a drug conviction. In Bartlett, the Arizona Supreme Court applied the Solem analysis to mandatory minimum consecutive sentences totaling 40 years without possibility of early release for convictions of sexual crimes against minors. The mere difference in the type of offense or the term of sentence is not, as respondent suggests, a significant factor in determining whether Bartlett should be held in conjunction with Harmelin. The important similarity between the two cases is whether the "objective factors" test of Solem v. Helm can be properly utilized to review non-capital, mandatory sentences. In this respect, this Court's resolution of the applicability of the Eighth

Amendment's prohibition against cruel and unusual punishment in Harmelin will provide necessary guidance and controlling precedent to the Arizona Supreme Court in Bartlett.

CONCLUSION

Petitioner, the State of Arizona, prays this Court to accept the petition for writ of certiorari in State of Arizona v. Joseph Bartlett, Jr., and reverse the decision of the Arizona Supreme Court that the mandatory sentence imposed violated the Eighth Amendment's prohibition against cruel and unusual punishment as interpreted by Solem v. Helm.

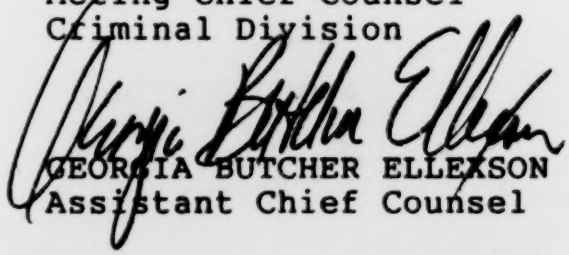
In the alternative, petitioner requests that the Court hold the instant case pending resolution of Harmelin v. Michigan.

DATED this 2nd day of November, 1990.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

RONALD L. CRISMON
Acting Chief Counsel
Criminal Division



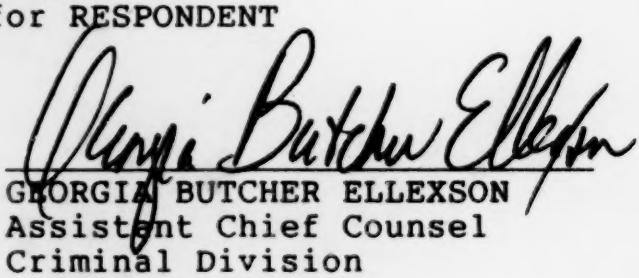
GEORGIA BUTCHER ELLEXSON
Assistant Chief Counsel

Attorneys for PETITIONER

CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed this 2nd day of November, 1990, to:

DAVID FLANNIGAN
P.O. Box 4340
Bisbee, Arizona 85603
Attorney for RESPONDENT



GEORGIA BUTCHER ELLEXSON
Assistant Chief Counsel
Criminal Division
1275 W. Washington
Phoenix, Arizona 85007

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